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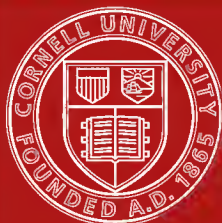
**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**

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REPORTS OF CASES  
DECIDED IN THE  
COURT OF PROBATE  
AND IN  
THE COURT FOR  
*Divorce and Matrimonial Causes.*

WITH TABLES OF THE NAMES OF CASES, AND  
INDEXES TO THE PRINCIPAL MATTERS.

BY  
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*With a Supplement*  
By T. H. TRISTRAM, D.C.L.

VOLUME IV.  
FROM HIL. T. 1865 TO TRIN. T. 1865,  
AND  
CASES IN SUPPLEMENT FROM HIL. T. 1858 TO TRIN. T. 1863.

LONDON:  
BUTTERWORTHS, 7, FLEET STREET,  
*Law Publishers to the Queen's Most Excellent Majesty.*  
HODOES, FOSTER, AND CO., GRAFTON STREET, DUBLIN.  
1871.

TAYLOR AND CO., PRINTERS,  
LITTLE QUEEN STREET, LINCOLN'S INN FIELDS.



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# REPORTS OF CASES

DECIDED IN THE

## COURT OF PROBATE

AND IN THE

## COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

In the Goods of WILLIAM JONES (deceased).

*Codicil.—Signature “beside the end of the Will.”—*

15 & 16 Vict. c. 24.

1865.

January 17.

In the Goods of  
WILLIAM  
JONES.

When the dispositive part of a Codicil, written on a half-sheet of note paper, occupied nearly the whole paper, and the names of the attesting witnesses were subscribed at the bottom of the page, and the signature of the testator was written down the lower part of the edge of the paper,

The Court held it to be a valid execution within the 15 & 16 Vict. c. 24.

William Jones, the deceased, left a duly executed will and a codicil, written on a half-sheet of note paper, in the following form :—“October 15, 1864.—Codicil of William Jones. “—I, William Jones, leave to Mary Jones, my sister, the “sum of eight pounds, having forgot to mention her in my “will, and the sum of eight pounds to Ann Jones, also my “sister; also to Thomas Andrew, gardener, the sum of three

1865. "pounds; and to Thomas Lawrence, joiner, the sum of three  
January 17. "pounds; and James Hough the sum of six pounds.

In the Goods of  
WILLIAM  
JONES.

"JAMES HOUGH.

"THOMAS LAWRENCE."

WILLIAM JONES.

It was deposed by James Hough that the testator signed his name at the side of the codicil in the presence of both of the attesting witnesses, who thereupon, in his presence, subscribed their names as witnesses.

Jan. 10.

*Dr. Spinks* moved for probate of the will and codicil. The testator clearly intended by his signature to give effect to the document,—and it is virtually at the foot or end of it,—and comes within Lord St. Leonards' Act, 15 & 16 Vict. c. 24. The fact that the signature is written perpendicularly and not horizontally can make no difference. (*In the Goods of Sarah Kimpton*, 3 Swab. & Tris. 427.)

SIR J. P. WILDE: I think the signature comes within the spirit of Lord St. Leonards' Act, and is good. I will consider the question.

*Cur. adv. vult.*

Jan. 17.

SIR J. P. WILDE: In this case probate is asked of a codicil, and the question is, whether it has been so executed as to satisfy the requirement of the statute in being "signed by the "testator at the foot or end thereof." It is written on a half-sheet of note paper, taking so much space that there is no room left at the bottom for a signature and attestation of witnesses together in the ordinary form. But it bears the signatures of both witnesses written at the bottom of the paper, and that of the testator written crossways along the lower edge of the side of the document. There is proof satisfactory to the Court that the testator intended the signature as the execution of the codicil, and made it in the presence of two witnesses, as required by law. The question is, whether the fact of execution, thus fully and duly made out

in other respects, is to be annulled by reason of the unusual position which the signature occupies. This the Court is most unwilling to do. *Ut res magis valeat quam pereat* is a safe and sound maxim. Within the limits of reasonable construction the Court is prepared to go all lengths to save a genuine act of execution from entanglement and defeat by formal requirements. Such is the spirit of the Amendment Act passed by Lord St. Leonards; and the words of that Act, construed in that spirit, are, I think, sufficient to enable me to support this codicil, for I think this signature is so placed beside or opposite the end of the codicil that it is apparent on the face of the codicil that the testator intended to give effect by such his signature to the writing signed as his codicil. And I decree probate of the codicil accordingly.

1865.

January 17.

In the Goods of  
WILLIAM  
JONES.

SMITH v. SMITH.

January 21.

*Costs.—Revocation of Administration.—Proof in Solemn Form.*

SMITH  
v.  
SMITH.

After a next of kin had taken out administration, a Will was propounded by one of the residuary legatees. The Court pronounced for the Will, but allowed the costs of the next of kin in obtaining administration, and in putting the residuary legatee upon proof in solemn form, out of the estate, as the residuary legatee did not produce the Will until after administration had been taken out, and several months after the testator's death, although he was several times desired by the next of kin to produce it if it existed, and he gave no explanation of the delay.

The deceased in this case was James Smith, of Penn, in Staffordshire, who died in December, 1863. He left him surviving the defendant, who was his brother and next of kin, and some nephews, of whom the plaintiff was one, and nieces.

1865.  
January 21.

SMITH  
v.  
SMITH.

After his death, the defendant inquired of the plaintiff orally, and also by letter, whether he had left a will, and asked him to produce it. The plaintiff stated that there was no will, and made no answer to the letters written to him on the subject by the defendant's solicitor on the 4th February, 1864, the 7th of March, 1864, and the 23rd of March, 1864. The last of these letters was as follows:—

“Nottingham, 23rd of March, 1864.

“Sir,—I am surprised that I have not yet heard from you “in reply to my last. I have since entered a *caveat* at the “Lichfield Registry, and unless you come to some terms at “once with your uncle I shall take further proceedings.

“I am, Sir, your obedient Servant,

“HARRY HOGG.

“Mr. Thos. Smith, West Bromwich.”

No notice being taken of these letters, in May, 1864, administration of the estate and effects of James Smith was taken out by the defendant. Proceedings were then commenced by the defendant to obtain possession of some of the deceased's property detained by the plaintiff. The plaintiff thereupon produced a will of the 7th of June, 1853, whereby the deceased gave all his property to his wife, and, in the event of her predeceasing him, which event happened, to his nephews and nieces and a sister-in-law. He also produced an unexecuted testamentary paper, appointing himself universal legatee. He propounded the will of June, 1853, and prayed that the administration to the defendant might be revoked. The defendant pleaded that the will was not duly executed, but gave notice under the 41st of the rules and orders in respect of contentious business, that he only intended to cross-examine the witness produced in support of the will. The cause was heard before Sir J. P. Wilde without a jury.

*Dr. Spinks* for the plaintiff.

*Mr. Searle* for the defendant.

1865.  
January 21.

The attorney who had drawn the will and propounded it, and who was one of the attesting witnesses, was examined, and proved its due execution. He stated, in cross-examination, that the testator took possession of it after it was executed. He did not see it or hear anything more about it until some time subsequent to the testator's death, when the plaintiff applied to him.

SMITH  
v.  
SMITH.

*Mr. Searle*: The due execution is proved, but the defendant is entitled to costs out of the estate, both of taking out administration and of this suit. The plaintiff's conduct in not producing the will obliged the defendant to take the grant of administration, and no explanation having been given of the delay the defendant was justified, under the circumstances, in putting the plaintiff upon proof in solemn form.

*Dr. Spinks*: The defendant is not entitled to the costs of the suit because, when the will was produced, he might have applied to the attesting witnesses, and satisfied himself that it was duly executed, without putting the estate to the expense of propounding it.

SIR J. P. WILDE: The defendant is clearly entitled to the costs of taking out administration out of the estate. It was not unreasonable, considering the circumstances under which the will was produced, and the delay in producing it, of which the plaintiff has never offered any explanation, that the defendant should desire to have it proved in solemn form. He is entitled to have his costs of the suit out of the estate. I revoke the administration and pronounce for the will, and I order the defendant's costs, both of obtaining the administration and of this suit, to be paid out of the estate.

1865.

SWEETLAND v. SWEETLAND.

Jan. 20 and 31.

SWEETLAND

v.

SWEETLAND.

*Will.—Several Sheets of Paper.—Signature at Foot or End.*

Deceased signed his name on five sheets of a testamentary paper, which consisted of six sheets; the names of the attesting witnesses appeared on each of the five sheets; on the sixth appeared a testimonium and attestation clause, and the names of the witnesses, but not the signature of the deceased; the writing at the end of the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet.

The Court refused to grant probate of the five sheets as containing the last Will and testament of the deceased.

The question raised in this case was whether an instrument propounded by the plaintiffs as the will of Charles Sweetland, dated the 2nd of July, 1864, was duly executed.

The instrument was written on six sheets of paper. The first five sheets contained a complete disposition of the deceased's property, and were respectively signed at the bottom by the deceased and two witnesses. The fifth sheet concluded in the middle of a sentence completed on the sixth, which last contained a provision for the remuneration of the trustees, and the usual revocatory clause, concluding thus,—“I do declare “this to be my last will. In witness whereof, I have hereunto set “my hand,” etc. Then followed the attestation clause, with the deceased's initials in pencil (written by his attorney), and the signatures of the two attesting witnesses. It was proved in evidence that the deceased asked the witnesses to attest “*his will;*” that he had signed the first five sheets in their presence, and that they had signed them after him; that they also signed the sixth sheet in his presence, without observing that he had not signed it; that he had subsequently spoken of the instrument to his brother as his will, and had given it to him with directions to deposit it at his banker's.



*Mr. Cleasby*, Q.C. (with him *Mr. J. Kaye*), for the plaintiffs, submitted that as the deceased intended the document to operate as his will, and the first five sheets contained a complete disposition of his property, probate might be granted to them, under 15 & 16 Vict. c. 24. The sixth sheet was really immaterial. (*In the Goods of Standley*, 7 N. C. 69; *In the Goods of Chamney*, *ib.* 70; *In the Goods of Jones*, 1 N.C. 396; *In the Goods of Kimpton*, 3 Swab. & Tris. 427; *In the Goods of Woodley*, *ib.* 429.)

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Jan. 20 and 31.

SWEETLAND  
v.  
SWEETLAND.

*Mr. Searle* (*Mr. Talfourd Salter* with him), for the defendants, consented to probate being granted.

*Cur. adv. vult.*

SIR J. P. WILDE: In this very peculiar case the testator did, I have no doubt, intend to execute in proper form a will drawn by his attorney, and consisting of six sheets. The question is whether he has done so. The first five sheets were signed at the bottom of each by the testator, and in the margin of each of them the two attesting witnesses have also signed their names. The fifth sheet breaks off in the middle of a sentence, which is continued on the sixth sheet, which last, after a clause relating to the remuneration of the trustees, and a clause revoking former wills, ends thus,—“I do declare “this to be my last will. In witness whereof I have hereunto “set my hand,” etc. Then follows a full attestation clause, in which certain verbal alterations are identified, and then the testator’s initials pencilled by the attorney for his signature. This signature by some extraordinary blunder was never made by the testator, though the attestation clause was properly signed by both the attesting witnesses.

January 31.

*Mr. Scott*, one of the attesting witnesses, who was examined before me, stated that the testator called him and *Mr. Bagot* into the room to witness the execution of his will. That the testator sat down at a writing table and signed sheet

1865. after sheet; that when he got up Mr. Bagot sat down and  
Jan. 20 and 31. signed sheet after sheet in the same manner; and that when  
SWEETLAND Mr. Bagot got up, he (Mr. Scott) sat down and followed the  
v. signature of Mr. Bagot. He could give no account of the  
SWEETLAND. omission of the testator's name on the last page, which he did  
not notice at the time. It was also proved that the testator  
spoke of the paper as his will, and gave it to his brother so  
describing it, and desiring that it might be safely deposited.

It was contended in favour of the will that probate might be granted of the first five sheets, and the signature at the bottom of the fifth sheet treated as an execution of the will. It was argued that these sheets contained a perfect disposition of the testator's property, and the sixth sheet might be disregarded. The first difficulty is, *quo animo* did the testator sign the fifth sheet? Ordinarily such a signature would be, I think, "intended to guard against other sheets being interpolated." So said Sir John Dodson in *Ewen v. Franklin*, Deane's Eccl. Rep. 7. Certainly no one would, on the face of the will, conclude that it was intended as the final signature by which the testator's affirmation of the will was to be signified. Still it might be argued that, when the testator sat down, he intended to execute the whole will; and if he stopped at the fifth sheet, it was only because he thought it was the last, and so intended his signature there as an execution of the whole. This view might deserve weighty consideration; but there is, I think, a fatal defect behind. The statute imperatively demands that a will should be signed "at the foot or end thereof." It is impossible to deny that this gentleman has not signed at the foot or end of his will, but only at the foot of the fifth page of it, and at the end of no definite part of it, for the fifth page ends in the middle of a sentence. "At the foot or end thereof." To what has the word "thereof" reference? Clearly, I think, to the whole will—to the whole of that which the testator then intended to execute as his will. Here he doubtless intended to execute

the whole six pages, but he has not put his name at the end of them. If the signature at the end of the fifth page can be said to be at the end of the will, the same thing is true of the signatures at the foot of each previous page. The Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will, and treating it as an execution of all that preceded it, and granting probate of so much of the will, to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes; and though in this case it is said that no disposition of property is rejected, the principle is the same. No case cited in the argument has gone this length; and it does not, I think, become the Court, in a laudable anxiety to give effect to the document, to twist or distort the plain meaning of the statute by ingenious construction, and virtually break the law to mend the testator's blunder.

The Court therefore pronounces against the will.

*Will pronounced against.*

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Jan. 20 and 31.

SWEETLAND  
v.  
SWEETLAND.

In the Goods of BODY (deceased).

February 7.

*Probate.—Draft of Destroyed Will.*

In the Goods of  
BODY.

The Court will not admit the draft of a Will, which has been inadvertently destroyed, to probate on motion.

Henry Body, late of East Dereham, Norfolk, labourer, died in July, 1864, leaving a duly-executed will. He also left another testamentary paper of a later date, which was not duly executed. After his death his wife inadvertently destroyed the will by burning it with some old papers, thinking it was of no value.

*Mr. R. Pritchard* moved the Court to decree that probate

1865. of a draft of the will should be granted to a nephew of the  
February 7. deceased, the surviving executor named therein.

In the Goods of  
Body.

SIR J. P. WILDE: People are constantly destroying wills, and the very persons who have destroyed them afterwards ask for probate of them. This is not one case, but one out of a hundred. I wish I had power to punish a person who destroys a will, but I have not. This, however, I always have done and always will do, I will have the will propounded before I admit it to probate; I will give no assistance whatever to a person who has destroyed a will.

*Motion rejected.*

February 7.

CROFT v. CROFT.

CROFT  
v.  
CROFT.

*Will.—Attestation Clause.—Evidence of Attesting Witnesses.*

Where the evidence of the attesting witnesses directly negatives due execution, such evidence not being rebutted either by direct or circumstantial evidence, and the veracity of the witnesses is unimpeached, the Court cannot, by reason of a formal attestation clause, and on the presumption *omnia esse ritè acta*, pronounce for the Will.

The only issue in this case was that of due execution, and was tried by the Court itself. The widow of the deceased, his second wife, opposed the will. There was a formal attestation clause, and a letter of instructions how to execute the will from the solicitor who drew it, but the evidence of the attesting witnesses directly negated due execution, and there was no evidence, either direct or circumstantial, to rebut their statements.

*Dr. Spinks* for the plaintiff.

*Dr. Wambey* for the defendant.*Cur. adv. vult.*

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SIR J. P. WILDE gave the following judgment:—In this case proof was offered to the Court of the execution of the will of Charles Cheesman Croft.

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v.  
CROFT.

It appeared on the evidence that Mr. Croft desired to make a will in favour of the children of a former marriage; but he was not bold enough to allow his second wife to know it. He therefore procured a will to be drawn through his brother-in-law, and having one day procured his wife's absence from home, he set about the execution of it. He appears to have known nothing about the requisite formalities himself, but with the will there was handed him a letter of instructions from the attorney who drew it as to the proper method of execution.

The question is, whether any evidence has been given upon which the Court can find a footing for the conclusion that the will was, in fact, executed according to the requirements of the statute. Both attesting witnesses were called; each denied positively that the other was present when they signed, and denied as positively that they saw the testator sign, or that they saw his signature, or that he acknowledged any signature to them. One of them was only asked to put his name to a paper so doubled down that no writing at all was visible. The other was only asked to sign "his will." On the other side, the only fact relied upon was the formal attestation clause, drawn by the attorney, and the conclusions to be drawn from the further fact of the letter of directions as to execution.

It would be largely exceeding the scope of any previous case if the Court were to hold this will well executed. In *Owen v. Williams* I have read the notes of the late judge, and I find there was a considerable body of evidence on both sides, and the Court gave credit to that in favour of the execution, disbelieving the oath of the attesting witnesses. In *Lloyd and*

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v.  
CROFT.

*Hart v. Roberts*, 12 Moo. P. C., the attesting witness admitted that, when he saw the paper lying on the table, it had the testator's name and that of the other attesting witness written on it. It was also beyond doubt that both witnesses were present together, and that the testator asked the witness to sign under the signature of the other. In *Gwillim v. Gwillim*, 3 Sw. & Tr. 200, both witnesses were present together. The testator asked them to witness his will, and they did so. The only difficulty was, that they did not recollect seeing his signature, though they could not say it was not there. These cases will not carry the conclusion for which the plaintiff contends.

I cannot, by reason of the attestation clause (not written at the time, nor read by the witnesses), presume a due execution in the teeth of direct testimony to the contrary, unless satisfied *aliunde* that the witnesses were conspiring to defeat the will, and I must, therefore, pronounce against it.

*Dr. Spinks*: As the litigation was caused by the testator's act, and the plaintiff is a nude executor, and propounds the will on behalf of the testator's children, he should have his costs out of the estate.

SIR J. P. WILDE: The costs of both parties must come out of the estate, and the sureties to the administration bond must justify to the amount of the shares which the children of the deceased will take.

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In the Goods of THERESE HENRIETTE AIMÉE DESHAIS  
(deceased).

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In the Goods of the COUNTESS DE VIGNY (deceased).

In the Goods of  
THERESE  
HENRIETTE  
AIMÉE  
DESHAIS.  
In the Goods of  
the COUNTESS  
DE VIGNY.

*Foreign will.—Probate in Common Form.*<sup>1</sup>

Probate in common form of a Will alleged to be valid by the law of a foreign country will be granted, on *prima facie* proof that the foreign Court has adopted it as a valid testament; but the certificate of a notary public, referring to some act of a foreign Court, is not sufficient. The prayer for probate may also be supported on another ground, viz., on the affidavit of a skilled person as to the validity of such a paper by the law of the foreign country, and on an affidavit as to the domicile of the deceased.

Where a translation of a Will, originally written in English, has been proved in the Court of a foreign country, and probate is asked here on that ground, a retranslation of the translation is the proper document to produce in this Court: but if proof of the validity of the paper by the law of the foreign domicile is relied on, then the original, or a copy of the original, should be before the Court.

This was a question arising on what purported to be an official copy of the will of the first-named deceased, a domiciled Frenchwoman.

The document brought into the registry for probate is, it is believed, correctly described in the following words. It appeared from the (alleged) copy of the will, with notarial certificate annexed, that the will was holographic, dated at St. Malo the 17th of July, 1861, and registered there on the 19th of November, 1864, (five days before the death,) the original of which was deposited for minute with M. Lemaire, notary, in conformity with the decree contained in the act of recognition of the said will drawn up by the president of the Civil Tribunal of First Instance of the district of St. Malo, on the 16th of the said month.

<sup>1</sup> For the validity of wills of British subjects made out of the United Kingdom, so far as due execution is concerned, see 24 & 25 Vict. c. 114.

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The registrars objected to granting probate on the certificate of the notary, and referred to a minute to the following

In the Goods of effect :—

THERÈSE  
HENRIETTE  
AIMÉE  
DESHAIS.

In the Goods of  
the COUNTESS  
DE VIGNY.

“ No copy will, verified under the hand of a foreign notary who has the custody of the foreign will, shall be entitled to probate in common form without some further proof of the validity of the original than is contained in such certificate.”

*Dr. Swabey* now moved the Court to grant probate without any further proof.—It is understood that the practice of the Prerogative Court for years past has been to grant probate of foreign documents so authenticated; and this seems in accordance with the principle that where the will has been recognised by the court of the domicil of the deceased, the Probate Court of this country will make its grant accordingly in respect of personal property in this country (*Williams's Executors*, p. 327, 5th edit.). If the practice of the Prerogative Court is correctly stated, the registry is bound to follow it. The 20 & 21 Vict. c. 77, s. 29, enacts that “the practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice of the Prerogative Court.”

SIR J. P. WILDE: The proof is not sufficient to entitle the Court to grant probate. To grant probate in common form of a foreign will, this Court will be satisfied with *prima facie* proof that some foreign Court has adopted the document as a valid testament, and this without any regard to the form in which such adoption is signified; it does not require that the form of approval should be the same as its own grant of probate. But here nothing is offered but the certificate of a notary public. That certificate refers to some act of recognition by a Court of civil jurisdiction; but the act of Court is



not before me in any shape in which I can give effect to it. 1865.  
 The mere reference to it in the certificate of the notary is not February 28.  
 enough; there must be an official copy of the act of recogni- In the Goods of  
 tion; or, if the prayer for probate is put upon another ground, THERESE  
 an affidavit from some skilled person as to the validity of the HENRIETTE  
 paper by the law of France, and an affidavit of the domicil of AIMÉE  
 the deceased. In the Goods of DESHAIS.  
 the COUNTESS  
 DE VIGNY.

As to the practice of the registry, I cannot find that any uniform practice can be said to have prevailed. In some recent cases, where probate had been granted on documents such as are now before the Court, it afterwards came to the knowledge of the registrars that the papers were considered invalid by the law of the domicil: hence the minute which stopped this grant in the registry.

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The Countess de Vigny died in December, 1862, leaving a will in English, dated the 24th of July, 1841. This will was translated by an expert in the French language, and the original, with the translation, was deposited in the Civil Tribunal of First Instance of the Seine. By the will the testatrix appointed her husband, the Count de Vigny, sole executor and universal legatee. He had since died, leaving a will which has been proved by his executrix in England. The executrix applied in the registry for probate of the will of the Countess de Vigny, and produced the French translation with the usual notarial certificate, and a re-translation of the French translation into English. The application having been refused,

*Dr. Spinks* moved for probate of the will of the Countess de Vigny to the executrix of her husband. The same question arises as in the case of Deshais. A will proved in common form in this country would be recognized as valid in any

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In the Goods of  
 THERESE  
 HENRIETTE  
 AIMÉE  
 DESHAIS.  
 In the Goods of  
 the COUNTESS  
 DE VIGNY.

foreign country, notwithstanding that such a probate is not conclusive, but may be revoked. By the comity of nations, therefore, the courts of this country should accept what is equivalent to probate in common form of a foreign will. It ought not to require more than the foreign country requires.

SIR J. P. WILDE: I quite agree with you, and if you can shew me any document that purports on the face of it to be equivalent to probate, any act of the foreign Court the language of which carries to my mind in any shape or form that the foreign Court has adopted the document as a will, that will be sufficient for me. A notarial certificate is really nothing, because a notary has to take a note of anything that any one chooses to bring him. But you are labouring unnecessarily, because you have an affidavit that the will is good according to the French law. You also require, however, an affidavit that the deceased was domiciled in France. You are asking for probate of a re-translation of the French translation of the English original, and not of the English original. If you rely on the affidavit you should ask for probate of a copy of the original.

*Dr. Spinks*: The application is in accordance with the established practice. The French translation has been admitted to probate in France, and probate is sought here not of the original but of the document proved in France. The rule must be the same whether the original is in the English or in the German or in the Russian language.

SIR J. P. WILDE: If you ask for probate of the document that was admitted to probate in France, your argument will apply; but you cannot have probate of that document, inasmuch as you have only a notarial certificate, which does not satisfy me that it was recognized as valid in France. You have, however, an affidavit of a French advocate that the will is good according to the law of France, and on that affidavit

you must ask for probate, not of the document, recognized by the French Court, but of the original will. You must, therefore, produce, not a re-translation of the French translation, but a copy of the original. In this case the proof is not sufficient. I am clear that the Court has no power to grant probate of any foreign will unless it is *prima facie* satisfied by some document or another that such will has been recognized by the foreign Court, or unless it is proved to be a valid will according to the law of the place where the testator was domiciled. There is a good deal in the argument of Dr. Spinks that the re-translation and not the original should be admitted to probate if it is shewn that the translation was recognized by the foreign Court. But if the other alternative is chosen, and if probate is sought of the document, not as having been recognized by the foreign Court, but as being valid by the law of the foreign country, it would be monstrous to grant probate of the translation of a translation, when the original will is English and a copy of it might be brought before the Court.

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In the Goods of  
THERESE  
HENRIETTE  
AIMÉE  
DESHAIS.  
In the Goods of  
the COUNTESS  
DE VIGNY.

*Motion rejected.*

## DOMVILE AND OTHERS v. DOMVILE.

February 28.

*Citation against Heir-at-Law.—Suit commencing with Caveat.  
—Probate Act, s. 61.*

DOMVILE  
AND OTHERS  
v.  
DOMVILE.

Where a suit has been commenced with a caveat, and the defendant had filed no plea to the declaration propounding the Will, a citation may issue against the heir-at-law, under the 61st section of the Probate Act.

The plaintiffs in this case were the executors of Miss Emily F. Domville, who died on the 15th of August, 1864, possessed of considerable personal property, and also seised of real

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DOMVILE  
AND OTHERS  
v.  
DOMVILE.

estate situate at Putney, leaving a will dated the 5th of August, 1864, by which she devised her said real estate to her sister, now Madame de Bille, who, together with her brother William Charles Domvile and Sir T. E. Winnington, she appointed her executors.

The defendant Sir Charles Domvile, who was her heir-at-law, and with Madame de Bille and Lady Winnington (wife of Sir T. E. Winnington) her only next of kin, entered a caveat against the will being proved, which was warned by the plaintiffs on the 1st of November, 1864. The defendant appeared to the warning, and on the 21st of November, 1864, the plaintiffs delivered their declaration, to which the defendant had filed no plea.

On the 31st of January, 1865, the Court, on motion of the plaintiffs, gave leave for a citation to issue against the defendant as heir-at-law to see proceedings. A difficulty had since been raised in the registry on the ground that, as no plea had been filed, and no citation issued in respect of the personal estate, the will could "not be said to be in dispute," which it was said was a condition precedent in this case to issuing the citation. An affidavit was filed by Madame de Bille, that she and her co-plaintiffs were desirous of proving the will in solemn form, and had propounded it for that purpose, and that she was desirous also that the heir-at-law should be cited.

*Dr. Tristram* moved for leave for the citation to issue, and submitted that, under the 61st section of the Probate Act, it ought to issue. The words of the section are: "Where proceedings are taken under this Act for proving a will in solemn form, or where, in any other contentious cause or matter under this Act, the validity of a will is disputed, the heir-at-law and persons interested in the real estate affected by the will shall be cited to see proceedings in like manner as next of kin and other persons having interest in personal estate affected by the will should be cited," &c. It has been

suggested in the Registry that the words in the first sentence of the section, "where proceedings are taken," refer only to suits commenced by a citation; and that the words "where" "in any other contentious cause or matter" the validity of a will is disputed, include suits originating with a caveat, and that this suit having originated with a caveat, as no plea has been filed, the will could not be said to be in dispute so as to entitle the citation to issue. The effect, however, of the word "taken" in the first sentence ought not to be so limited in construction, and Sir C. Cresswell had so held in *Nicholls and Freeman v. Binns*, 1 Swab. & Trist. 21, which was a suit commenced, not by a citation, but, like the present one, by a caveat, and a citation was allowed to issue to cite the heir-at-law before any plea had been filed. The affidavit of Madame de Bille showed that the plaintiffs were, in the words of the first sentence, taking proceedings for proving the will in solemn form.

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DOMVILE  
AND OTHERS  
v.  
DOMVILE.

SIR J. P. WILDE: Is there any opposition to your motion?

*Dr. Tristram*: No.

SIR J. P. WILDE: The citation may issue. I think the construction you have put upon the word "taken" is correct.

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JONES v. WILLIAMS AND OTHERS.

March 1.

*Pleas.—Intervenors.—Practice.*

JONES  
v.

A party cited to see proceedings, who has appeared and opposes a testamentary paper, is not allowed to adopt the pleas of the defendant, but should file pleas on his own behalf.

WILLIAMS AND  
OTHERS.

The plaintiff propounded the will and five codicils of Francis Williams, Esq., deceased. The defendant pleaded as to the five codicils undue execution and incapacity.

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JONES

v.

WILLIAMS AND  
OTHERS.

*Dr. Spinks*, for one of the next of kin, who had been cited to see proceedings, and had appeared during the progress of the suit, moved that his party might have leave to adopt the plea of the defendant in opposition to the last codicil. The pleadings are completed, and the party cited not having pleaded would not be entitled to take part in the trial. There is no rule and no practice as to what steps should be taken by him to enable him to appear at the trial under such circumstances. I suggest that the most convenient course will be that a minute should be made that he shall be allowed to appear as a party at the trial, adopting the pleas of the defendant as to the last codicil.

*Dr. Wambey*, for the the plaintiff, consented.

SIR J. P. WILDE: I am unwilling to create a new precedent of the kind suggested by *Dr. Spinks*, and to dispense with a plea substituting for it a minute of the Court. I think the party cited may plead like any other party. I give him leave to file a plea within a week.

March 14.

In the Goods of GOOLD (deceased).

In the Goods  
of GOOLD.

*Administration Bond.—Excessive Penalty by Mistake.—Cancellation of Bond.*

Where, under a misapprehension as to the value of the personal estate of an intestate, the penalty of an administration bond was too large, the Court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry to be cancelled.

George Goold, late of Shanghai, in China, deceased, died March 13, 1855, a widower, without child or parent, and intestate.

In February, 1856, administration of his property was granted by the Prerogative Court of Canterbury to H. M. F. Goold, his brother, and one of his next of kin, who died in May, 1861, leaving part of the deceased's property unadministered. In June, 1861, on the citation and non-appearance of the other brothers and sisters, administration of the unadministered effects of George Goold was granted to Matilda Goold, the widow, relict, and sole executrix of the will of H. M. F. Goold. Mrs. Goold, in the affidavit to lead the administration, swore that the unadministered effects of the deceased did not amount in value to £2000. She paid the stamp-duty of £60, and, together with her sureties, executed a bond in the penalty of £4000, and this bond had been filed in the registry.

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In the Goods of  
GOOLD.

The reason why Mrs. Goold valued the unadministered estate at this amount was, that she believed, that at the time of his death, George Goold was entitled, under certain deeds of settlement and family arrangements, to one-twelfth part of a certain freehold estate; and such real estate was not sold until October, 1864, when it realized £30,000. She then discovered, that the deceased had, by an indenture dated the 31st of July, 1830, made between himself of the one part, and George Woodroffe (since deceased) of the other part, bargained, sold, and released all his right, title, and interest in the above estate to George Woodroffe, his heirs, executors, and assigns, for his and their own absolute use and benefit; consequently, the whole property left unadministered by the first administration did not amount in value to the sum of £20. On the 24th of February, 1865, the Commissioners of Inland Revenue, on a representation to them of the aforesaid facts being made, ordered that the £60, the amount of the duty paid on the letters of administration of the unadministered effects of the deceased, should be returned, and the stamp be cancelled. Mrs. Goold, with one surety, had entered into a new bond in the sum of £100.

1865. *Dr. Deane*, Q.C., moved the Court to order that the new  
 March 14. bond should be substituted for the old one, and that the latter  
 In the Goods of should be delivered out of the registry to Mrs. Goold to be  
 GOOLD. cancelled.

SIR J. P. WILDE: As the Commissioners of Inland Revenue have investigated the matter and have returned the duty, and as it appears from the affidavit of the administratrix that there is no such estate as was supposed, and that the whole matter has originated in a mistake, I think the bond for £4000 may be given out to be cancelled on the bond for £100 being brought into the registry.

March 14.

WEST AND NICHOLL *v.* WEST.

WEST AND  
 NICHOLL  
*v.*  
 WEST.

*Pleading.—Undue Influence.—Practice.*

A plea alleging undue influence without naming any person by whom the undue influence has been exercised is bad and must be amended. But a plea alleging undue influence by A. B. and others, is a sufficient plea, though the other party would be entitled to particulars of the "others," on summons.

The plaintiffs propounded, as executors, the will and two codicils of the Dowager Countess of Amherst. The defendant pleaded, as to the second codicil, undue execution, that it was not the codicil of the deceased, and that it was procured by undue influence, but no person was named by whom the undue influence was alleged to have been exercised.

*Mr. Searle* moved to strike out the second plea, that the codicil was not the codicil of the deceased, and that the defendant might be ordered to specify by way of particulars the



persons by whose undue influence the codicil was alleged to have been procured.

SIR J. P. WILDE: The second plea must be struck out, the third plea must be amended by inserting the names of the persons by whose undue influence the codicil was procured.

*Mr. Searle:* We do not ask for the plea to be amended, we shall be satisfied with particulars in order to save delay.

SIR J. P. WILDE: It is not a case for particulars but for amendment; the plea is bad as it stands. If undue influence had been alleged to have been exercised by A. B. and others, the plea would be good, though the other party would be entitled to particulars of the "others" on summons.

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March 14.

WEST AND  
NICHOLL  
v.  
WEST.

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BIRKS v. BIRKS.

April 21.

*Probate of Two Testamentary Papers.—Mistake.—Admissibility of Parol Evidence.—Testamentary Papers not inconsistent with each other.—The First not revoked by the Last.*

BIRKS  
v.  
BIRKS.

A testator, having erased a clause in his Will after the execution, asked a friend to make a fresh copy of the Will, omitting the erased clause. The copy was made; but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both Wills having remained in his custody up to that time. The two Wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed, as together containing the deceased's last Will and Testament.

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The plaintiffs were the executors of Peter Birks, deceased, and the defendants were some of his next of kin.

Peter Birks, James Birks, and Mary Elizabeth Birks, spinster, the plaintiffs, alleged in their declaration, that Peter Birks, of Laughton-en-le-Morthen, in the parish of Laughton, in the county of York, gentleman, deceased, who there died on or about the 13th of May, 1864, made his last will and testament, bearing date the 19th of April, 1861 and now remaining in the Registry of this Court, marked A, and therein appointed the said Peter Birks, James Birks, and Mary Elizabeth Birks, executors. That the said will after having been reduced into writing, was signed at the foot or end thereof by the said testator, in the presence of two witnesses present at the same time, who subscribed the said will in the presence of the said testator, and that at the time of the execution of the said will the said testator was of the full age of twenty-one years, and of perfectly sound mind, memory, and understanding.

That, after the execution thereof, the said testator, having a mind and intention to revoke one specific devise therein contained, cancelled and erased the words:—"I devise all those my two cottages adjoining each other, situate at Cordwell Green, in the parish of Laughton aforesaid, now in the respective occupations of George Fowler and Charles Jarvis, unto my housekeeper, Mary Dawson, to hold unto the said Mary Dawson and her heirs." That the said testator, having the mind and intention effectually to revoke the said devise, and otherwise to confirm the said will, instructed Mr. John Acom, of Laughton-en-le-Morthen aforesaid, grocer, to recopy his said will, omitting only the aforesaid devise to the said Mary Dawson.

That the said John Acom, in copying the same, inadvertently, and by mistake, omitted divers other words and sentences besides those contained in the devise to the said Mary Dawson, to wit, first the word "in" between the words "be"

and "England," in the ninth line from the top of the first page of the said will; secondly, the words "But if the said Gerald Peter Tarleton shall die under the age of twenty-one years," between the words "years" and "either," in the twentieth and twenty-first lines from the top of the first page of the said will; and thirdly, the words "unto my said nephew, Peter Birks and his sister, my niece, Mary Elizabeth Birks, to hold unto them, my said nephew, Peter Birks, and his said sister, my niece, Mary Elizabeth Birks, and their heirs, in equal shares and proportions as tenants in common. I bequeath all the residue of my personal estate whatsoever and wheresoever," following the words "whatsoever and wheresoever," in the seventh line of the second page of the said will, and extending to the word "unto" in the eleventh line of the said second page of the said will.

That the said incorrect copy now remaining in the Registry of this Court, marked with the letter B., and bearing date the 4th day of July, 1862, was signed by the testator at the foot or end thereof, in the presence of two witnesses present at the same time, under the belief that the said paper B was an exact copy of the said paper A, save and except the omission of the devise to the said Mary Dawson; that the said two witnesses whose names appear upon the said paper B, subscribed the same in the presence of the said testator, and at the time of the execution of the said will marked B, the said testator was of perfectly sound mind, memory, and understanding; and that the said papers A and B, without the said devise to the said Mary Dawson, together contain the last will and testament of the said testator.

Elizabeth Gordon (wife of William Robert Gordon), the said William Robert Gordon, Pamela Priscilla Dale (wife of Edward Samuel Dale), and the said Edward Samuel Dale, the defendants, pleaded:—

That the paper writings A and B, without the devise to Mary Dawson, propounded by the plaintiffs, as together con-

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taining the last will and testament of Peter Birks, late of Laughton-en-le-Morthen, in the county of York, gentleman, deceased, are not, and do not together contain the last will of the said deceased.

That the said paper writing marked A was and is revoked by the said paper writing marked B.

*Replication.*—As to the first plea the plaintiffs join issue.

As to the second plea, they deny that the paper writing marked A was or is revoked by the paper writing marked B, and they take issue thereon.

The cause came on for trial before Sir J. P. Wilde without a jury.

*The Queen's Advocate* and *Dr. Spinks* for the plaintiffs.

*Dr. Wambey* for the defendants.

The due execution of paper A, the first will, was proved, and that the papers A and B both remained in the deceased's custody up to the time of his death.

William Wasteneys, a schoolmaster, who formerly lived near the deceased, said: Sometime after the execution of the first will the deceased told me that his housekeeper, Mary Dawson, was going to leave him and get married, and he did not think it would be right that she should have his cottages. He fetched the will into the room, and said, "I will let you see me cross it out." He then crossed out the devise to Mary Dawson. He asked me to copy out the will again, leaving out the paragraph with the devise to his housekeeper. I objected to do so, and recommended him to go to a solicitor. I saw nothing more of the will after that, and in the following December I left Laughton.

John Acom: I am a grocer at Laughton. In July, 1862, the testator sent for me, and I went to his house. He was very ill. He asked me to copy out a will for him, with the

exception of a few lines he had crossed out. He produced paper A to me. A few lines with the devise to Mary Dawson were crossed out. He asked me to make a fresh copy of the will, leaving out those lines. I agreed to do so, and took the will home to my house. He said he was afraid the will would not stand good unless a fresh copy was made. I copied out the will at my own house. I believed that I had copied it out correctly. I took the copy (paper B) to his house with the first will. I told the deceased that I believed that I had copied it correctly to the best of my knowledge. He said nothing to me about making alterations in the copy. Neither of us read over the copy I had made. He was so shortsighted that he could not have found out the mistake. I did not know of the omissions I had made in the copy until the solicitor told me the day the deceased was buried. It was entirely my mistake, and I am very sorry for it.

The following is a copy of paper A. The words printed in italics are those which were omitted in paper B:—

“ This is the last will and testament of me, Peter Birks, of  
 “ Laughton-en-le-Morthen, in the parish of Laughton, in the  
 “ county of York, gentleman. I bequeath the following legacies, namely,—To each of my brothers, William Birks, of  
 “ Manchester, hairdresser, £200. To my nephew, Alexander  
 “ Birks, of Manchester, shopman, £200. To my nephews  
 “ and nieces, children of my brother Simon Birks, who shall  
 “ be *in* England at the time of my decease, £150, to be  
 “ divided among them in equal shares and proportions. To  
 “ my niece Sarah Ann, now the wife of Ephraim Webster, of  
 “ Witney, in the county of Oxford, schoolmaster, £150. To  
 “ my farm-servant David Bulmer, in consideration of his  
 “ long service to me, £50. I bequeath to my executors,  
 “ hereinafter named, the sum of £500, upon trust to pay the  
 “ same to Gerald Peter Tarleton, son of my late niece  
 “ Sarah, the wife of John Willington Tarleton, late of Solihull, in the county of Warwick, gentleman, deceased, when

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“ he shall attain the age of twenty-one years. *But if the said Gerald Peter Tarleton shall die under the age of twenty-one years*, either in my lifetime or after my decease, “ then upon trust to pay the same sum of £500 to Anne “ Tarleton, Mary Paulina Tarleton, and Mary Margaret “ Tarleton, the daughters of my said late niece Sarah Tarle- “ ton, who have attained or shall attain the age of twenty-one “ years in equal shares and proportions. I devise all that my “ close of land situate on Laughton Common, in the parish of “ Laughton aforesaid, commonly called or known by the name “ of ‘ common field ’ (with the large shed thereon), containing “ about eight acres, now in my own occupation, to William “ Hollingworth, of Staveley, in the county of Derby, farmer “ (nephew of my late wife), to hold unto the said William “ Hollingworth and his heirs. I devise all my field of land “ situate at Brampton-en-le-Morthen, in the parish of Tree- “ ton, in the county of York, containing about five acres, now “ in the occupation of Thomas Skelton ; and also all that my “ field of land situate at Brampton-en-le-Morthen aforesaid, “ commonly called or known by the name of the ‘ gated “ ‘ lands,’ containing about two acres and twenty-two perches, “ now in my own occupation, unto my nephew Peter Birks, of “ Manchester, traveller, to hold unto my said nephew Peter “ Birks and his heirs. *I devise all those my two cottages ad- “ joining each other situate at Cordwell Green, in the parish “ of Laughton aforesaid, now in the respective occupations of “ George Fowler and Charles Jarvis, unto my housekeeper, “ Mary Dawson, to hold unto the said Mary Dawson and her “ heirs.* I devise all that my small farm situate at Marsh “ Lane, in the parish of Eckington, in the county of Derby, “ containing about twenty acres, now in the occupation of “ George Spencer. And all my real estate whatsoever and “ wheresoever unto my said nephew Peter Birks, and his sister, “ my niece, Mary Elizabeth Birks, to hold unto them, my “ said nephew Peter Birks and his said sister my niece,

“ *Mary Elizabeth Birks, and their heirs, in equal shares*  
 “ *and proportions, as tenants in common. I bequeath all*  
 “ *the residue of my personal estate, whatsoever and where-*  
 “ *soever, unto my said nephew Peter Birks, and his said*  
 “ *sister, my niece, Mary Elizabeth Birks, in equal shares and*  
 “ *proportions, as tenants in common, for their own respective*  
 “ *use and benefit. I direct my executors to invest during*  
 “ *the minority of the said Gerald Peter Tarleton the said*  
 “ *sum of £500 bequeathed to them upon the trusts afore-*  
 “ *said, in the Three per Cent: Consols, and to receive the*  
 “ *dividends thereof as they shall become due and be pay-*  
 “ *able, and to pay the same to the guardians of the said*  
 “ *Gerald Peter Tarleton, to be applied by them in the*  
 “ *maintenance and education of the said Gerald Peter*  
 “ *Tarleton. I devise all estates vested in me as trustee or*  
 “ *mortgagee in any real or personal estates unto my said*  
 “ *nephews Peter Birks and James Birks, their heirs, execu-*  
 “ *tors, administrators, and assigns, upon such trusts and sub-*  
 “ *ject to such equities as shall be subsisting concerning the*  
 “ *same respectively at the time of my decease. I appoint my*  
 “ *said nephews Peter Birks and James Birks, and my said*  
 “ *niece Mary Elizabeth Birks executors of this my will. In*  
 “ *witness whereof I have hereunto set my hand this 9th day*  
 “ *of April, in the year of our Lord 1861.*

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“ PETER BIRKS.”

A regular attestation clause followed.

*Dr. Wambey* : The second paper contains a fresh appointment of executors ; it is a complete testamentary instrument, and it therefore revokes the first paper, although it does not contain an express clause of revocation.

*The Queen's Advocate* : Both papers are duly executed ; there is no clause of revocation in the second, the residue amounting to about £3000, is undisposed of by the second,

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and both are entitled to probate, as together containing the last will and testament of the deceased.

The following cases were cited:—*Plenty v. West*, 1 Rob. 264; *Stoddart v. Grant*, 1 Macq. 171; *Geaves v. Price*, 3 Sw. & Tr. 71; *Cutto v. Gilbert*, 9 Moo. P. C. 146; *Henfrey v. Henfrey*, 4 Moo. P. C. 29.

SIR J. P. WILDE: The evidence in this case discloses that a blunder has been made, the effect of which is that certain portions of the intentions of the testator were not expressed in the paper which he last executed. Indeed, the mistake appears upon the face of the paper, and the language bears traces of the omissions. The question is, whether this blunder is one which it is within the power of the Court to set right, as the Court would, no doubt, desire to set it right if it has the power. I quite admit that it is beyond the power of the Court to interpolate anything in a will, or to supply an omission by parol evidence, for, by so doing, it would give the force of a testamentary act to parol evidence, contrary to the statute. If this case came within that rule it would be impossible for the Court to supplement the will by inserting the omissions; but it is not so. Besides the second paper B there is the original will A, from which it is copied, and which is duly executed. The question therefore arises whether the Court, on reading paper B, can come to the conclusion that paper A has been revoked. It is said that the words "This is the last will and testament" have sometimes been relied on as showing that the testator intended all previous instruments to be revoked; but, independent of the language of the Privy Council on that point, it is obvious that a man might very well sign a paper in which that language is used without intending to revoke all previous instruments. It is also said that the appointment of executors constitutes a revocation of previous instruments. For my own part I repudiate the notion that there are any particular words, or any particular



forms of expression, on which one's finger can be put as an universal test of revocation. I hold that the Court is bound to look, as far as it is justified in looking, at all the circumstances attending the execution of the will. A question of great importance then arises in this case as to the extent to which parol evidence is available. It is conceded that it is not available to supply a mere omission; but it is undoubted law that parol evidence may be given to show the circumstances under which a testamentary paper was executed, and probate of a will has been refused where it has been satisfactorily proved by parol evidence that the testator signed it, not intending it to operate as a will, but for some collateral object. Parol evidence being admissible to show under what circumstances a will was executed, the Court may draw what light it can from that evidence. The evidence in this case shows that at the time when the will B was executed the testator thought he was executing a copy of the will A, which he had caused to be made for the purpose of removing what he thought was a defect in the will A, namely, the erasure of one of the clauses. Under these circumstances, it would be monstrous for the Court to come to the conclusion that the testator intended to revoke those portions of paper A which were omitted from paper B by accident. Looking at all the circumstances, and the total absence of any language in paper B tending to revoke paper A, I think that paper A is still alive as far as is not inconsistent with paper B. I therefore think that probate must be granted of both papers as together containing the last will of the deceased.

*Dr. Wambey* moved for costs out of the estate.

SIR J. P. WILDE: Certainly.

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CHARLES ADOLPHUS SLUMBERS (deceased).

*Grant for the use of Next of Kin, Lunatic.*—25 & 26 Vict.  
c. 86, s. 12.

An intestate, whose property was under £1000 in value, left no known relation except a sister who was of unsound mind, but had not been found so by inquisition, and who had no property of her own. The Court refused to grant administration under 20 & 21 Vict. c. 77, s. 73, for the use and benefit of the lunatic, to a stranger in blood, until the applicant should obtain an order from the Court of Chancery under the 12th section of the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), rendering the property of the lunatic available for her maintenance and benefit.

The deceased in this case died on the 23rd of December, 1864, intestate, without any known relation except a spinster sister, who was of unsound mind, but had not been so found by inquisition.

The deceased had for some years been clerk to Mr. Chabot, a newspaper agent. On the day of his death Mr. Chabot had called at his lodgings, and found thirty-eight sovereigns in a coat pocket. Shortly afterwards, on searching the lodgings, he found hidden in the cupboard several packets, containing in all 644 sovereigns. Mr. Chabot had taken possession of this money, and after paying thereout for mourning for the deceased's sister, had placed the balance in a bank. Mr. Chabot had also paid the rent for the deceased's lodgings, medical and other expenses during his last illness, and funeral expenses, and had advanced certain sums for the maintenance of deceased's sister, who was in great poverty.

*Dr. Spinks* moved, under the 73rd section of the Probate Act, for letters of administration of the personal estate of the deceased to be granted to Mr. Chabot for the use and benefit of Caroline Slumbers, the natural and lawful sister and only next of kin of the deceased.

*The Queen's Advocate*, on behalf of the Queen's Proctor, 1865.  
 who had received notice of the motion, consented to the grant April 20 & 25.  
 being made, the securities to justify.

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SIR J. P. WILDE: The registrar tells me that by a recent statute the Court of Chancery is enabled by a summary process in a case of this kind to appoint a person to take charge of the estate without taking out a commission of lunacy. The case had better stand till next week.

SIR J. P. WILDE: In this case application was made for a grant of administration to a stranger in blood of the deceased for the use and benefit of his only known relation, a sister, who is said to be lunatic. As was stated at the time, there is an Act of Parliament under which application can be made to the Court of Chancery in a case of this kind. The 25 & 26 Vict. c. 86, s. 12, provides that, "where by the report of one  
 "of the Masters in Lunacy or of the Commissioners in Lunacy, or by affidavit or otherwise, it is established to the  
 "satisfaction of the Lord Chancellor, intrusted as aforesaid,  
 "that any person is of unsound mind and incapable of managing his affairs, and that his property does not exceed  
 "£1000 in value, or that the income thereof does not exceed  
 "£50 per annum, the Lord Chancellor, intrusted as aforesaid, may, without directing any inquiry under a commission of lunacy, make such order as he may consider expedient for the purpose of rendering the property of such  
 "person or the income thereof available for his maintenance  
 "or benefit, or for carrying on his trade or business. Provided nevertheless, that the alleged insane person shall have  
 "such personal notice of the application for such order as  
 "aforesaid as the Lord Chancellor shall by general order to  
 "be made as after mentioned direct." I think that an application ought to be made under that section. It is said that the applicant intends to avail himself of the statute, but

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wishes to obtain administration in the first instance. I think he ought to go to the Lord Chancellor in the first instance; he will probably be entrusted with the care of the lunatic's estate; and if he then comes here I can make a grant of administration to him under the 73rd section of the Probate Act. I am told in the Registry that the practice under the statute has been such, and that several grants of administration have been made to persons who have complied with the 12th section of the above statute.

*Dr. Spinks* asked for costs of the present application out of the estate.

SIR J. P. WILDE: I will make no order as to costs. If Mr. Chabot gets administration, he will be able to take his costs out of the estate.

May 2.

In the Goods of JAMES POWELL (deceased).

In the Goods of  
JAMES  
POWELL.

*Execution of Will.—Testator's Signature.—Foot or End.*

A testator wrote a Will on three sides of a sheet of note paper. The attestation clause and names of the attesting witnesses were at the bottom of the second side; a dispositive clause was written on the third side, and all the letters of the testator's signature, excepting the two last, which extended over to the third side, were on the second side.

HELD, to be a good execution.

The deceased in this case, James Powell, late of Exeter, surgeon, made a will, dated the 9th of February, 1864, written on the two first sides, and a portion of the third side, on a sheet of note paper. At the bottom of the second side there was the attestation clause and the names of the attesting

witnesses. At the top of the third side were these words, which had been written, as deposed to by one of the attesting witnesses, before execution:—"I should wish, if there are any books in my possession at my death, that some of them might be selected, and, as a remembrance, presented to my friend the Rev. Robert Oliver, Dr. Sieveking, and Dr. Parkes, of Netley Hospital, Hants, respectively." The signature of the testator, James Powell, was at the foot of the second side, with the exception of the two last letters of the surname, which extended to the third side.

1865.

May 2.

In the Goods of  
JAMES  
POWELL.

*Mr. C. A. Turner* moved for probate of the whole document, including the words at the top of the third side, as being substantially signed at the foot or end thereof.

SIR J. P. WILDE: I have looked at the will in this case. Assuming the paper to have been spread open at the time of execution, the signature would have embraced the whole of the writing, which was written on the third as well as on the second side. If it was not spread open, then it might be said the signature would only refer to the second side. I think I am justified in holding that it embraces the whole of the writing, and grant probate accordingly.

In the Goods of WRIGHT (deceased).

May 30 and  
June 6.

*Will.—Position of Signature.*—15 & 16 Vict. c. 24, s. 1.

A Will filled two pages of a sheet of note paper, leaving no room on the second page for the signatures of the testator and attesting witnesses, which were written along the sides of the Will upon the third page.

In the Goods of  
WRIGHT.

HELD, to be a due execution.

William Wright, late of King's Lynn, Norfolk, died on the

1865. 6th of April, 1865, leaving a will dated the 8th of April,  
 May 30 and 1864. The will was written on the first and second pages of  
 June 6. a sheet of note paper, and finished at the end of the second  
 In the Goods of page, leaving no room for the signature of the testator. The  
 WRIGHT. signatures of the testator and of two attesting witnesses were  
 written along the side of the will on the third page. One of  
 the attesting witnesses made an affidavit to the effect that the  
 will had been duly signed and attested, and the only question  
 was whether, considering the position of the testator's signa-  
 ture, it was duly executed.

May 30. *Mr. R. A. Pritchard* moved the Court to decree probate of  
 the will. *Cur. adv. vult.*

June 6. SIR J. P. WILDE, after stating the facts, said: I am of  
 opinion that the execution is sufficient. I cannot distinguish  
 the case from one which I decided last term, *In the Goods of*  
*Jones*. I think the signature of the testator is "so placed at,  
 "or after, or following, or under, or beside, or opposite to the  
 "end of the will," that it is "apparent on the face of the will  
 "that the testator intended to give effect by such his signa-  
 "ture to the writing signed as his will."

June 13 and 20. In the Goods of GEORGE THORNE (deceased).

In the Goods of *Will.—Conditional or General.—Actual Military Service.—*  
 GEORGE 11th section of *Wills Act*.  
 THORNE.

The words, "I request that in the event of my death while serving in  
 "this horrid climate, or any accident happening to me," held not to  
 make a testamentary paper conditional on the event of death while  
 in that climate.

A mere averment that deceased held such a rank in his regiment, was  
 in such a place, and was in actual military service, at the date of  
 writing the paper in question, is not necessarily enough to entitle  
 such paper to be treated as a soldier's testament; but the affidavit

should contain a statement of the circumstances full enough to enable the Court to judge whether the case falls within the meaning attributed by previous cases to the 11th section of the Wills Act. 1865. June 13 and 20.

In the Goods  
GEORGE  
THORNE.

The deceased in this case died in London on the 16th of September, 1864. He left behind him a paper writing, the material parts of which were as follows :—

“Cape Coast Castle, Gold Coast, 2nd of November, 1863.

“Be this known to all concerned: I request that in the event of my death while serving in this horrid climate, or any accident happening to me, I leave and bequeath to my beloved wife, Ambrosine Thorne, residing in the Island of St. Lucia, West Indies, or her heirs, the sum of £1521. 14s. 9d. sterling, being the amount lodged to my credit, etc. I have also to request that, should anything happen me, that this letter will be sufficient for the President, who may take an inventory of my effects, to act on behalf of my beloved wife for me, etc. I will feel truly obliged to the officer commanding the 4th W. I. Regt. if he will, at my decease, take the necessary steps to procure the highest pension for my beloved wife and child, or if my beloved should prefer the price of my commission as a captain, viz. £1800, which I am led to suppose can be obtained, particularly should I be killed in action, etc. I consider that every person should be prepared for the worst, and particularly in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter.

“I now sign my name in the presence of

“GEO. THORNE, Capt. 4th W. I. Regt.

“Witness my signature,

“Joseph Gray,

“S. A. Surgeon.”

The affidavit of James Lyon Thorne, brother of the deceased, stated, among other things, as follows :—

1865. "My said brother went to Cape Coast Castle, on the Gold Coast, Africa, on or about the 1st of July, 1863, in command of a detachment of the said regiment, and whilst stationed there made and executed his last will and testament beginning [the affidavit then described the above paper]. On the said 2nd day of November, 1863, the date of his aforesaid will, my said brother was in actual military service. In the month of July following he left Africa for England, invalided, and died at the Craven Hotel, Strand, on the 16th of September, 1864."

June 13 and 20.  
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THORNE.

The affidavit also spoke to the whole of the paper writing, with the exception of the witness's name and description, being in the hand of the deceased.

June 13. On the above facts,

*Dr. Swabey* moved for letters of administration with the will annexed to be granted to the widow as the sole legatee. The first question is, whether the paper is contingent on the event of the writer's death having taken place "while serving in this horrid climate." It is submitted that the words which follow, "or any accident happening to me," are sufficient to give a general effect to the paper. The whole scope of the paper is testamentary, *i. e.*, intending to dispose of property after death, and the words "or any accident," etc., may fairly mean "death happening to me elsewhere than in this horrid climate."

SIR J. P. WILDE: I have read this paper over very carefully, and I think it is not necessary to limit its operation to the event of death while on the Gold Coast. But I am not clear at present that the paper is entitled to be treated as a soldier's will under the 11th section of the Wills Act: "provided always and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Since the case



of *Drummond v. Parish*, 3 Curt. 522, something more than a mere averment of the deceased having been in actual military service has been required, namely, a statement of circumstances full enough to enable the Court to judge for itself whether the case comes within the interpretation put upon the section by the case of *Drummond v. Parish*.

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June 13 and 20.

In the Goods of  
GEORGE  
THORNE.

On June 20th *Dr. Swabey* renewed the motion on the following affidavit from the widow of deceased:—

June 20.

“In the month of June, 1863, I was living with my said husband at Jamaica, where he was serving as senior captain of his said regiment. Some time in the summer of that year disputes arose between Governor Pyne, in command of the English settlement on the Gold Coast, Africa, and the King of Ashantee, and military operations were commenced by her Majesty’s troops under the command of the said Governor Pyne against the King of Ashantee. My said husband was ordered with a detachment of his regiment to reinforce her Majesty’s troops on the Gold Coast, and left Jamaica on the 1st of July, 1863. On arriving on the Gold Coast my said husband joined the expedition formed to march into the interior as acting-major; and in contemplation of such march, as I verily believe, he made his will now in the registry of this court, etc. At the date of such will my said husband was in actual military service against the King of Ashantee. My said husband returned to England and died on the 16th of September, 1864; and her Majesty the Queen has allotted to me through the War Office a special pension in consideration of my husband’s death as having occurred or been brought on through the aforesaid Ashantee expedition.”

SIR J. P. WILDE: I think there is a sufficient statement of circumstances which bring the case within the principle laid down in *Drummond v. Parish*, and the grant may be made as prayed.

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June 6.

In the Goods of NICKALLS (deceased).

In the Goods of  
NICKALLS.

*Two Wills of the same Date.—Parol Evidence of Intention.—  
Probate of both Wills.*

Three duly-executed testamentary papers bore the same date, two of which purported to dispose of the residue. It was proved by parol evidence that the first was intended to apply only to certain property in Canada, and that the two last were intended to apply only to certain property in England. The three papers were admitted to probate as together containing the testator's last will and testament.

John Lott Nickalls died in March, 1865, having duly executed three wills, each of them bearing date the 25th of October, 1864. They were all in his handwriting. The first, paper A, was as follows :—

“This is the last will and testament of me, John Lott  
“Nickalls, of the parish of Orsett, in the county of Essex,  
“England, that is to say, after my decease I give and bequeath  
“unto my cousin, Patteson Nickalls, of Bromley, in the  
“county of Kent, the whole of my freehold property situate  
“in the city of Kingston, in Upper Canada, together with  
“my waterwork shares and gas stocks, on condition of his  
“giving to each of his sisters, viz., Elizabeth Nickalls, Maria  
“Rudge, and Hannah Nickalls, the sum of £20 a year, each  
“for and during their natural lives. Should any calamity  
“befall the property at any time, then one half of the income,  
“These ladies shall be entitled to receive the same, and should  
“the said Patteson Nickalls die before his children, then the  
“said property to be equally divided amongst all his children,  
“subject to the sums to be paid yearly to the above parties—  
“Elizabeth Nickalls, Maria Rudge, and Hannah Nickalls,—  
“and I appoint Patteson Nickalls and his son Tom Nickalls,  
“of Bromley, my executors to this my will, dated October  
“25, 1864.”

The second, paper B, was as follows :—

"This is the last will and testament of me, John Lott  
 "Nickalls, of the parish of Orsett, in the county of Essex,  
 "England. I give and bequeath to the following parties, In the Goods of  
 "viz.:—To Mrs. Hardwidge, my sister-in-law, one hundred NICKALLS.  
 "pounds; to my sister-in-law, Mrs. Greenaway, three hundred  
 "pounds, and in the event of her death, to her daughter,  
 "Elizabeth Bunter; to Richard James, of Orsett Mill, the  
 "sum of three hundred pounds, and in the event of his death,  
 "to his two sons and his daughter, equally divided; to the  
 "sons of the late Thomas James, viz., Joseph James and  
 "Richard James, the sum of twenty-five pounds; to Charles  
 "E. James, the sum of one hundred pounds; John Frederick  
 "James, the sum of fifty pounds; and to Ruth Fortt, of Bath,  
 "the sum of four hundred pounds (that is to say), the in-  
 "terest of the same during her life, and, after her decease, to  
 "her children, James Fisk and Sarah Matchett; the residue  
 "I leave to Ruth Fortt and her children, after all my just  
 "debts are paid. I appoint Mr. Joseph James my executor,  
 "and Mr. Richard Bunter my executor, for which I give him  
 "£25."

This was attested by Richard Bunter and Stephen Hallow Bread.

Paper C was substantially the same as paper B, but the  
 clause appointing executors was omitted. Affidavits of Patte-  
 son Nickalls, of Sarah Hardwidge, and of Elizabeth Greena-  
 way, were filed, from which it appeared that the deceased was  
 a widower without children; that Patteson Nickalls was one  
 of the next-of-kin and one of the persons entitled in distri-  
 bution; that the deceased was possessed of property in Canada  
 and in England, and that he had frequently, previous to  
 October 25, 1864, expressed his intention to leave his Cana-  
 dian property to Patteson Nickalls and his English property  
 to his wife's family.

Sarah Hardwidge, one of his attesting witnesses, stated in  
 her affidavit that, on the 25th of October, 1864, the deceased,

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before preparing the will marked A, said to her, "I shall "make the American will first;" that she was present in the sitting-room during a portion of the time in which he was preparing his wills; that the wills marked A and B were written out by him, and ready for signature before either of them was signed; that after they had been prepared the deceased said it would be necessary to have three witnesses for the Canadian will; that the paper marked A was duly signed and attested by the three witnesses, whose names appear upon it; that immediately after the execution of A, the deceased signed paper B, which he called his English will, which was duly attested; that she had read over both wills before either of them was executed, and that when Mr. Bunter was about to sign paper B, she said, "Nickalls, Mr. Bunter, being an "executor, should not sign;" that deceased said, "Bunter, "sign," and accordingly Bunter did sign; that she repeated that it was illegal, and the deceased said, "I will write it out "again;" that he appeared somewhat tired and excited, and she suggested that he should defer it till the next day, that he said he should do it at once, and he proceeded to write it over again; and that paper C was accordingly written out by him, and duly signed and attested.

May 30.

*Dr. Spinks*, for the executors appointed by paper A, moved for probate of the three papers as together containing the last will and testament of the deceased.

*Dr. Swabey*, for the executors appointed by paper B, consented.

*Cur. adv. vult.*

SIR J. P. WILDE: I am of opinion that probate ought to be granted of all the three papers, as together constituting the last will of the deceased. The grant will be made to the four executors.

*Probate granted.*

MASON *v.* The Next of Kin of WILLIAM ROBINSON.

In the Goods of WILLIAM ROBINSON (deceased).

*Administration to Creditor.—Original Citation not forthcoming.*

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*v.*

The next of kin  
of WILLIAM  
ROBINSON.  
In the Goods of  
WILLIAM  
ROBINSON.

When the estate of the deceased, who died without any known relation, was barely sufficient to pay his liabilities, and a citation had been issued and served on behalf of a creditor upon the Queen's Proctor and by advertisement, but had been lost or destroyed by his solicitor's clerk, who had absconded for embezzlement, the Court dispensed with the rule requiring the citation to be returned into the Registry, and made the grant of administration to the creditor.

William Robinson, the deceased, died at an hotel, of which the plaintiff was proprietor, without any known relation, indebted to the plaintiff in the sum of £39. 10s. 4d. There was also a further sum due to the plaintiff for the expenses of his funeral. His debts altogether amounted to £140, his assets to £150. The usual citation had been issued and served on the Queen's Proctor, by the managing clerk of the Plaintiff's solicitor, who had since absconded, having grossly neglected his employer's business, and embezzled a considerable amount of his money. No appearance had been entered to the citation, and the plaintiff was unable to proceed with the motion in consequence of the citation not having been filed by the managing clerk, who could not give any account of what had become of it. A copy of the citation was annexed to an affidavit.

*Dr. Spinks* moved to dispense with filing the citation in the Registry, and for the grant to go to the Plaintiff as a creditor of the deceased.

SIR J. P. WILDE: I think the Court may in this case dispense with the rule requiring the citation to be returned into

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of WILLIAM  
ROBINSON.  
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the Registry before making the grant. It is necessary as a general rule that the citation should be returned into the Registry, in order to preserve a record of what has been done in each case. But here there is a reason for dispensing with the rule.

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June 27.

In the Goods of ELIZABETH NOSWORTHY (deceased).

In the Goods of  
ELIZABETH  
NOSWORTHY.

*Inconsistent Wills of same Date.—Execution by Mistake.*

A testatrix duly executed two inconsistent Wills, bearing the same date, and written on different sides of the same sheet of paper. Evidence was admitted to shew that the deceased signed one of them only as her Will, and signed the other by mistake. The Court granted probate of the paper signed by the testatrix, with the intention that it should operate as her Will, and not of the other paper.

In this case the deceased died on the 2nd of January, 1865, leaving two testamentary papers, A and B, written on different sides of the same sheet of paper, both duly executed and both bearing the date of 6th of January, 1862. The first side of the sheet of paper (A) contained a lithographic form of will, with blank spaces for names and dates, and one of these blank spaces was filled up, in the handwriting of the testatrix, with the name of Maria Nosworthy, to whom testatrix, by this paper, left all her property, both real and personal, and whom she appointed executrix. The testimonium clause, which was filled up in the testatrix's handwriting, was as follows:—  
“I have set my hand the — day of January 6th one thousand  
“eight hundred and 62,” the word “January” and the figures being in writing and the other words lithographed. This paper contained a clause revoking all former or other wills and was duly signed and attested.

The second testamentary paper (B) was written on the

second side of the sheet, at the back of the lithographed form. It was in the testatrix's handwriting, and the beginning was apparently copied from the lithographed form. The paper read as follows :—"This is the last will and testament  
 " of Eliz. Nosworthy, of Powhill, Devon, made this — day  
 " of January 6th, 1862, in the year of our Lord eighteen  
 " hundred and 62. I hereby revoke all wills made by me  
 " heretofore. I appoint Maria Nosworthy, my niece, to be  
 " my executrix, and direct all my just debts and funeral ex-  
 " penses shall be paid as soon as conveniently may be after my  
 " decease." The will then proceeded to make a bequest of Elwell Cottage to Mrs. Alfred Medland, and to leave legacies of £25 to each of her nieces, Mary, Martha, and Agnes Nosworthy; of £20 each to her nephew Samuel Nosworthy and her niece Mrs. Dennington, and to divide her jewellery, plate, wardrobe, books and pictures between her nephew and her nieces. This will was also duly signed and attested by the same witnesses who had subscribed their names on the preceding side of the sheet of paper. The affidavit of Henrietta Sharland, one of the attesting witnesses, stated that the deceased had been for many years housekeeper to Mr. Thomas Melliush, with whom the deponent was intimately acquainted; that in January, 1862, the deponent was staying at Mr. Melliush's house, and the deceased asked her and Mr. Melliush to see her execute her will; that they went into deceased's sitting-room, and she produced from a drawer the sheet of paper containing the two testamentary papers in question; that she opened the sheet of paper, and holding it with the second and third pages wide open, said, "This is my will;" that she then placed it open on the table and signed her name at the end of the second side of the sheet, and the deponent and Mr. Melliush then subscribed their names in her presence; that the deceased, who was old and near-sighted, then asked the deponent to see whether there was any other place where she and the witnesses ought to sign; that the deponent then

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turned to the first page of the sheet, and, after reading the lithographed attestation clause on that page, told the deceased that she and the witnesses must sign there also, and they did so; that the deceased did not make any further observation about either of the two wills, and that all the writing in both the papers had been written by the deceased previous to their execution.

*Dr. Wambey* moved for the two papers as together containing the wills of the deceased.

SIR J. P. WILDE: The deceased appears to have put her name to paper A under an impression that it was a form which it was necessary to go through in order to give validity to paper B. If that is so the signature to paper A would not be an execution, and paper B would be the only duly-executed paper. The parties may, if they please, propound paper A, and take the opinion of the Court or a jury, because the question is one of fact, namely, what was done at the time of execution.

*Dr. Wambey*: I will take probate of paper B alone.

June 27.

In the Goods of COWARD (deceased).

In the Goods of  
COWARD.

*Will—Wife of convicted Felon.*

The wife of a convicted felon is a *feme sole* as to the power of disposing by Will at least of property acquired after her husband's conviction.

Sarah Coward, the wife of Fleming Coward, died on the 30th July, 1858, leaving a will, dated the 21st June, 1858, whereof she appointed Joseph Slee sole executor. She was the daughter of James McNeil, late of Maryport, who died



in April, 1846, leaving a will, whereby he devised a messuage in Maryport for his wife for life, and after her decease to his daughter, S. Coward; and bequeathed to his wife for life, afterwards to S. Coward and to his two other children, the whole of his household furniture, plate, linen, and china; and bequeathed to his daughter S. Coward one-sixteenth share of and in the brig *Congress* of Maryport.

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At the Carlisle Summer Assize of 1855 Fleming Coward was tried and convicted of an attempt to murder his wife's brother J. McNeil. Sentence of death was recorded against him, and he was transported for life, and is still living and undergoing his sentence. No transfer of the one-sixteenth share of the brig *Congress* was made to Fleming Coward or to Sarah Coward until after Fleming Coward's conviction; it was then transferred to Sarah Coward, and is now duly registered in her name as owner. Joseph Slee, the executor, being in Castlemaine, in the county of Talbot, Victoria, by power of attorney, dated the 14th of November 1864, appointed J. McNeil his attorney for the purpose of obtaining administration with the will annexed of Sarah Coward. A statement of facts was submitted to the Queen's Proctor, who, by letter dated the 9th of May 1865, stated that he declined to interfere.

*Dr. Spinks* moved for a grant of administration with the will annexed of the personal estate and effects of Sarah Coward to J. McNeil, as the attorney of Joseph Slee, the sole executor therein named, for his use and benefit until such time as he should duly apply for and obtain probate of the said will. The question is, whether the will of a married woman, made whilst her husband is undergoing sentence for felony, is a valid will? The authorities show that a married woman, after her husband is convicted and whilst he is undergoing his sentence, is a *feme sole* as to her testamentary capacity:—1 Jarm. on Wills, p. 35, 3rd edit.; 2 Bright on

1865. Husband and Wife, p. 39; *Countess of Portland v. Prodger*,  
 June 27. 2 Vern. 104; *Ex parte Franks*, 1 Moo. & Sc. 1; and *In the*  
 In the Goods of *Goods of Martin*, 2 Rob. 405.  
 COWARD.

SIR J. P. WILDE: The case of *Ex parte Franks* was very fully argued and well considered in the Court of Common Pleas, but unfortunately the Court did not give a detailed judgment, as it was a question sent from Chancery. On the authority of the cases you have cited, and especially of *Ex parte Franks*, I think that I am justified in holding that a woman whose husband is a convict is to be regarded as a *feme sole*, for the purpose, at any rate, of making a will. Administration with the will annexed may therefore issue as prayed.

*Administration decreed.*

July 18.

CORDEUX v. TRASLER.

CORDEUX  
 v.  
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*Administration.—Prior Petens.—Affidavits in Reply.—Practice.*

*Cæteris paribus*, the male is preferred to the female, in a contest for a grant of administration; but the female, when with the consent of the male she is *prior petens*, is preferred to the male, who afterwards opposes her taking the grant.

The Court will allow affidavits in reply to be read at the hearing of a cause, if it thinks such affidavits are necessary.

This was an administration suit. The intestate, George Trasler, late of Houghton, Northamptonshire, farmer, died at Houghton on the 12th of May, 1865, a bachelor, leaving Mary Cordeux, the plaintiff, his lawful niece, and George Trasler, the defendant, his lawful nephew, the only persons entitled in distribution to his estate. The value of the property was about £5000.

On the 17th of May, Mrs. Cordeux, with her husband's consent, applied to the District Registry of Northampton for a grant of administration, and was duly sworn, and executed the usual bond ; but before the grant was issued a *caveat* was entered by the defendant. The plaintiff in her petition alleged that she was a fit and proper person to have the grant, being well educated and accustomed to business, and of independent means, and able and willing to give justifying security ; that the defendant was an uneducated man, and was, and had been for many years, a private soldier, and was not accustomed to business, and was not a fit and proper person to have the grant.

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The defendant's answer denied that he was uneducated or unaccustomed to business, or an unfit and improper person to have the grant, and alleged that he was the deceased's heir-at-law, that he had served for upwards of twenty years in her Majesty's Fifteenth Regiment of Hussars, and was entitled to be discharged on a full pension ; and that he was able and willing to give justifying security.

Affidavits were filed in support of the petition and the answer by both parties. The plaintiff's affidavits contained charges of misconduct against the defendant.

*Dr. Wambey*, for the defendant, moved for leave to file affidavits in answer to the plaintiff's affidavits, as to the charges of misconduct. Those charges are not contained in the pleadings, and the defendant has not had an opportunity of answering them. He referred to the 69th rule.

July 11.

*Dr. Spinks*, for the plaintiff: The practice in the Ecclesiastical Courts was to object at the hearing to any material fact in the affidavits being read which was not stated in the pleadings.

SIR J. P. WILDE : It seems to be a very reasonable practice  
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that the Court at the hearing should determine what is material and what is immaterial in the affidavits, and should then call on the other side to answer only what is material. The Common Law Procedure Act authorized the Courts of Common Law in all cases to allow affidavits to be filed in reply, and those Courts adopted the practice of allowing the cause to come on for hearing, and then, if they thought necessary, allowing affidavits already prepared to be read in reply. The defendant may prepare affidavits in reply; and if I think it necessary, I will allow them to be read at the hearing.

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*Dr. Spinks* moved for a grant of administration to the plaintiff.

*Dr. Wambey* : The defendant has prepared affidavits in answer to the charges against his character.

SIR J. P. WILDE : As *Dr. Spinks* has not read those parts of his affidavits, and does not rely on them, it is unnecessary to read the affidavits in answer to them.

*Dr. Wambey* moved that the grant might be made to the defendant, in accordance with the rule that the male is preferred to the female. He cited *Chittenden v. Knight*, 2 Lee 559, and *Iredale v. Ford*, 1 Swab. & Twist. 305.

SIR J. P. WILDE : In *Iredale v. Ford*, Sir C. Cresswell said :  
 “ There are several dicta in the books on the subject of the  
 “ rules which guide the discretion of the Court in granting ad-  
 “ ministration where the statute does not apply. *Dr. Waddilove*  
 “ is right in stating that, *cæteris paribus*, males are preferred to  
 “ females; but there is another principle relied on by *Dr. Spinks*,  
 “ that the grant will follow the majority of interests, and will  
 “ be made as desired by the majority of interests. I think this  
 “ is a more stringent rule than the one giving a preference to

“males over females.” There is also another rule which sometimes guides the Court, and is mentioned in Coote’s ‘Probate Practice,’ c. 8, s. 1, namely, that the grant will be made *priori petenti*. It is difficult to weigh with great exactitude the merits of the respective applicants for a grant, nor is it necessary to do so, because, provided the Court is satisfied that the person it selects is responsible, and is able and willing to give security, the object of the grant is achieved. It often happens that a contest for administration is caused by jealousy arising between persons nearly related to one another, rather than from fear of loss to the estate. In this case the defendant appears to have been on very friendly terms with Mr. Cordeux, and to have discussed the affairs of the deceased with him shortly after the death, and to have expressed a desire that Mr. Cordeux should wind up the affairs and manage everything, and all he wanted to know was, how much he would have. Therefore the plaintiff is not only *prior petens*, but she was so at first with the consent of the defendant. The Court will not disturb that arrangement without proof that the person to whom the grant is about to be made is an improper person to take it. The rule that the male is to be preferred to the female is sufficiently answered by the rule that the *prior petens* is to be preferred, and I decline to interfere. Mrs. Cordeux will therefore take the grant.

*Dr. Spinks* and *Dr. Wambey* moved that the costs of the plaintiff and of the defendant respectively might be paid out of the estate.

SIR J. P. WILDE: I think the costs of both parties may be paid out of the estate.

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*Marriage and Decree of Dissolution in Cape of Good Hope.—  
Second Marriage.—Right of Widow to Administration in  
England.*

A., born in Ireland, resided at the Cape of Good Hope, first, in her Majesty's Forty-Fifth Regiment of Foot, and afterwards in the Cape Mounted Rifles, from 1842 till 1862. In 1850 he married B., resident in the colony; in 1852 the Colonial Court decreed a dissolution of that marriage; in 1856 A. married C., B. still living. A. died in 1863 intestate; and, on a question as to the right to letters of administration raised between C. and the brother and next of kin of A :

The Court held, that C. was entitled to administration as the widow of A.

This was a question arising on a claim to the administration of the personal estate of Thomas Argent. Eleanor Argent, the plaintiff, by her declaration, alleged, that Thomas Argent, late of Port Louis, Mauritius, deceased, died on or about the 4th of December, 1863, at Port Louis aforesaid, intestate, without child or parent, leaving the said Eleanor Argent his lawful widow and relict, and John Argent his natural and lawful brother (and certain sisters) his only next of kin.

John Argent, the defendant, by his pleas, (1) denied that the plaintiff was the lawful widow and relict; (2) alleged that on or about the 22nd of March, 1850, the said Thomas Argent, being then a Colour-Sergeant in her Majesty's Forty-Fifth Regiment of Foot, was lawfully married to Amelia Argent, then Amelia Adams, spinster, at Graham's Town, Cape of Good Hope; that the said Amelia Argent, the lawful wife of the said Thomas Argent, died in or about the year 1860, and that the said Thomas Argent having never again married subsequently, died intestate and a widower.

The replication first took issue on defendant's pleas; and,

secondly, to the second plea, further replied, that the said marriage in the plea mentioned was, on or about the 6th of October, 1852, by proceedings duly taken in the Circuit Court holden in and for the division of Albany, Graham's Town, Cape of Good Hope, and having jurisdiction in that behalf, dissolved by decree or judgment of the said court; which said decree or judgment still remains in full force, etc., and thereupon the deceased Thomas Argent became and was lawfully divorced from the said Amelia Argent, who ceased to be the lawful wife of the said Thomas Argent; that subsequently to the said decree, and on or about the 11th of July 1856, the said Thomas Argent was lawfully married to the plaintiff, then Eleanor Pridmore, spinster, at Graham's Town, aforesaid, and the said plaintiff became and was the lawful wife of the said Thomas Argent, and continued such until his decease.

Rejoinder to the further replication alleged that the marriage of the said Thomas Argent with Amelia Argent was not dissolved as alleged; that by reason of the said Thomas Argent being a British subject and a domiciled Englishman on the 6th of October 1852, the Court aforesaid had not jurisdiction to dissolve the marriage; that the said decree has no force or effect in England; that the said Thomas Argent, by the law of England, did not become and was not lawfully divorced from the said Amelia Argent; that the said Thomas Argent was not lawfully married to the plaintiff on or about the 11th of July 1856, when the said Amelia Argent was still living.

Sur-rejoinder took issue on the rejoinder.

The following facts were agreed upon by the parties, and admitted by a previous order of the Court:—First, Thomas Argent was born in Ireland; secondly, Thomas Argent became and was resident in the colony of the Cape of Good Hope in or about the year 1842, being in her Majesty's Forty-Fifth Regiment of Foot, and stationed there on duty; thirdly, Thomas

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1865. Argent continued to reside in the said colony on duty in the said regiment and in the Cape Mounted Rifles until the year April 22, and July 26. 1862, with the exception of a short time when on leave of absence; fourthly, Amelia Argent, in the pleadings mentioned, was resident in the colony of the Cape of Good Hope during the years 1850 and 1852; fifthly, the decree of divorce in the plaintiff's replication mentioned, was made on the 6th of October 1852; sixthly, the plaintiff became and was resident in the colony of the Cape of Good Hope in or about the year 1854, and continued to reside therein until the year 1862.

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On these pleadings and admitted facts, the case was heard by the Court itself on the 22nd of April.

*Mr. W. Willis* opened the pleadings.

*The Queen's Advocate (Sir R. J. Phillimore)*: We claim administration for the plaintiff as widow. It is admitted that she married after a decree of divorce; it will be for the other side to show why she cannot claim as widow.

*Dr. Spinks*, for defendant: If you claim as widow, you must show that you are so.

SIR J. P. WILDE: On the pleadings the plaintiff alleges that she is the lawful widow, which the defendant denies; the affirmative of that issue is on the plaintiff, whose counsel must therefore begin.

*The Queen's Advocate*: In support of the invalidity of the decree of dissolution it will be said that the deceased was a soldier in her Majesty's service, and never lost his domicile of origin. The first marriage took place at the Cape in March 1850; and *Simonin v. Mallac*, 2 Swab. & Tris. 67, shows that the jurisdiction of a Matrimonial Court is founded by reason of the contract having been entered into within



the local limits of the jurisdiction. The argument in *Lolly's* case, Russell & R. C. C. 237, no longer applies now that dissolution of marriage is recognized by the law of this country. We admit that there may have been an English domicile for certain purposes, but contend that there was a sufficient residence to found the jurisdiction of the Colonial Court, which has by its constitution authority to give relief for breaches of the marriage contract.

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*Dr. Spinks*, for the defendant: The principle of this question was very ably treated in No. 47 of the 'Edinburgh Review,' 112. That the deceased was an English subject is at the bottom of the whole question; the Court must take the law of this country as it was in 1852, when dissolution of marriage was unknown to it. The decree of the Colonial Court must have been effectual or ineffectual for purposes in this country at the time it was made, and can acquire no validity by the subsequent change in our law. The Courts of this country have adopted the position of international law laid down in 1st Burge ('Commentaries on Colonial and Foreign Laws'), 681, namely, that the *status* of marriage depends on the law of the domicile. *Warrender v. Warrender*, 2 Cl. & F.; Bishop on Marriage and Divorce, ss. 150, 714, 720, 721. In the present case the residence in the colony was a mere temporary sojourn, the deceased was liable to be sent away at any moment, and the actual length of residence is immaterial, his only forum for matrimonial relief was England. *Simonin v. Mallac* only determined that the effect of a contract entered into in this country and the *status* of persons consequent upon it, may be ascertained by the Courts of this country; but the question of altering the *status* never arose in that case. The jurisdiction of this Court was considered in *Bond v. Bond*, 2 Swab. & Tris. 93; *Brodie v. Brodie*, 2 Swab. & Tris. 259; *Ratcliffe v. Ratcliffe*, 1 Swab. & Tris. 467.

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SIR J. P. WILDE: To show that this Court has jurisdiction would not show negatively that no other Court has it.

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*Dr. Spinks*: That, with submission, is one of my propositions.  
*Tollemache v. Tollemache*, 1 Swab. & Tris. 557; *McCarthy v. De Caix*, 2 Russ. & My. 614.

SIR J. P. WILDE: What ought the Court to do if it were satisfied that the plaintiff is the deceased's widow by the law of the Cape of Good Hope, and in possession of a grant of administration made there?

An informal copy of the decree of divorce made at the Cape of Good Hope was put in *de bene esse*.

*The Queen's Advocate*, in reply, cited *Pitt v. Pitt*, 4 M'Q. H. of L. Reps. 5th part. *Cur. adv. vult.*

Subsequently SIR J. P. WILDE suggested that, to enable the Court to dispose of all the points argued, it would be desirable that further admissions of fact should be made, but the sittings after Trinity Term drawing to an end without this having been done, the learned judge, on 26th July, gave the following judgment:

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SIR J. P. WILDE: The facts in this case are not before the Court with such distinctness as to raise all the questions intended. But, as the suggestion of the Court that further admissions should be made has not been attended with much result, I must deal with the case as it stands, without further delay. And I shall decide it upon one short ground. It appears that the deceased was continuously resident at the Cape of Good Hope for many years preceding and up to the period of his death. While there, in the year 1850, he married Amelia Adams. This marriage was lawfully dissolved, according to the law of the place, in the year 1852, by reason of the

wife's adultery. In the year 1856 the deceased, still resident in the same place, contracted a second marriage with Eleanor Pridmore, the plaintiff, which was a valid marriage according to the law of that place. And the question is, whether this Court is to hold this last marriage to be invalid according to the law of England, upon the ground that the deceased was not domiciled at the Cape of Good Hope, but somewhere else, and that according to the law of that place, wherever it may be, the deceased had no capacity to contract the second marriage, because the first marriage, though legally dissolved at the Cape, and for a ground of divorce recognized and acted upon in England, namely, adultery, was still a valid and subsisting marriage unless dissolved by the Courts of the country of his domicile? This will indeed be carrying the principle that the law of domicile governs the relations of marriage and the remedies of divorce to its extreme length. For here we have a marriage good and binding at the place where it is celebrated, both parties capable of contracting it according to the law there, and the supposed incapacity now relied upon both created and removed there—all the parties being resident there and nowhere else during the whole time. I do not propose to enter upon the much-vexed question, so ably and vigorously debated by the Scotch lawyers, whether the Courts of a country where the parties are substantially resident, though not domiciled, ought to be held in other countries to have the power of entertaining the question of divorce, at least to the extent of applying the same remedies for the same offences as the country of the domicile would have done. For, assuming this to be resolved in the negative, there is nothing admitted in this case from which the conclusion can be clearly drawn that the deceased had no domicile at the Cape, or that he was a domiciled Englishman. And, if these difficulties were removed, it would still remain to be shown on clear authority not only that the divorce was invalid by the law of the domicile, but that the capacity to con-

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April 22, and  
July 26.  
— — —  
ARGENT  
v.  
ARGENT.

1865.  
April 22, and  
July 26.

ARGENT  
v.  
ARGENT.

tract the second marriage was a question to be referred to the law of the domicile, to the disregard of the *lex loci*, and to the annulling of a marriage contracted innocently and *bond fide* in reliance upon that law. Those who have considered these questions most will be the most ready to admit that an inflexible rule, which makes either the *lex loci* or the *lex domicilii* paramount in the regulation of matrimonial relations, will hardly meet the justice of particular cases. But I can conceive no state of the law likely to work more hardship and injustice than that which would permit some legal incapacity springing out of the law of his distant domicile to be at the service of a man who induces a woman to marry him in the country where they both live, for the annulling of such a marriage. And, upon the authorities as they now stand, I am not, I think, forced to any such conclusion. For these reasons the Court declines to pronounce the marriage of the plaintiff invalid, and decrees administration to her as the widow of the deceased.

July 11 & 18.

BELLEW v. BELLEW AND OTHERS.

BELLEW  
v.  
BELLEW AND  
OTHERS.

*Suit pending.—Receiver in the Court of Chancery.—Administration pendente lite.*

The practice of the Prerogative Court, and of the Probate Court hitherto, has been not to grant administration pending suit, unless by consent, or on proof that such a grant was necessary for the preservation of the property; but in future cases the Court will follow the practice of the Court of Chancery in appointing receivers, and will appoint an administrator pending suit where a *bond-fide* suit is pending, irrespective of the property being in particular danger.

The defendant Henry Bellew propounded, as sole executor, the will dated the 5th of August 1863, of Caroline Countess Bellew, late of Stockleigh House, North Gate, Regent's Park,

who died on the 24th of February 1863. The plaintiff is a sister and one of the next of kin of the deceased. Several nephews and nieces of the deceased, and parties entitled to distribution, had been cited to see proceedings, and had appeared. The deceased was possessed of no real estate.

1865.

July 11 & 18.  
BELLEW  
v.  
BELLEW AND  
OTHERS.

Her personal property was estimated as follows:—

Thirty-eight years' unexpired term in the lease of Stockleigh House and grounds, and furniture, and pictures, etc., in the house .	£4,424	16	6
Cash in the house . . . . .	88	4	9
Balance at Bankers' . . . . .	480	0	0
Three per Cent. Consols . . . . .	18,662	8	6
Three £100 East Indian Bonds . . . . .	300	0	0
Three £100 Turkish Bonds . . . . .	300	0	0
Stock and Shares in different companies . .	391	0	0
Reversion to an annuity, value unknown . .			
Amount unknown in the Dutch Funds . .			
	£24,646	9	9

The defendant had declared, propounding the will. The plaintiff and one of the parties cited had pleaded, traversing the due execution of the alleged will and the capacity of the testatrix.

On the 17th of June, 1865, the plaintiff and several of the parties cited to see proceedings filed their bill of complaint against the defendant, praying, amongst other things, that some proper person might be appointed by the Court of Chancery as receiver, pending the proceedings in the Court of Probate, to take possession of the leasehold property of the deceased, and to collect, get in, and receive all her other personal estate and effects.

*Dr. Spinks* moved the Court, on behalf the defendants, to decree administration *pendente lite* of the effects of the de-

July 11.

1865. ceased to Henry Baldock Kingsford, on his giving security July 11 & 18. and filing inventory.

BELLEW  
v.  
BELLEW AND  
OTHERS.

The defendant had filed an affidavit, stating that Mr. Kingsford was the senior partner of the firm of Kingsford and Garland, accountants, of St. Martin's Lane, and was a fit and proper person to be appointed administrator *pendente lite*, and was uninterested in the suit.

*Mr. H. Bullar*, for the plaintiff, opposed the motion. It is not alleged that the property is in any jeopardy, and it appears from the schedule in the defendant's affidavit that it is not of a nature to require the immediate appointment of an administrator. It would be therefore contrary to the practice of the Court to make such an appointment without the consent of all parties. (*Williams on Executors*, 433, 434 (5th edit.) ; *Godrich v. Jones*, 2 Curt. 453.)

*Dr. Tristram*, for some of the parties cited, supported the motion.

*Mr. Searle*, for others of the parties cited, opposed it. He referred to Dodd's Probate Practice, 456.

*Cur. adv. vult.*

July 18.

SIR J. P. WILDE: an application was made last week for the appointment of an administrator *pendente lite* in this suit. The applicant's affidavit did not show, and it was not pretended that it did show, that the estate was in any jeopardy or peril; but it appeared that some of those who were opposing the appointment of an administrator had applied to the Court of Chancery to appoint a receiver. It was argued that it was not necessary in this Court to show that the estate was in peril, but that it was competent to either party who desired to have the management of the estate confided to some indifferent person, to obtain a grant of administration *pendente lite*, without the

consent of the other side. Not only the text-books, but the cases cited against that argument, unquestionably established the proposition that in the Ecclesiastical Courts administration was never granted, unless with the consent of all parties, or unless a case of necessity was made out. Has the practice of this Court been different from that of the Ecclesiastical Courts? In one case since I had the honour of presiding here, I refused to grant administration *pendente lite*, on the ground that no necessity was made out for it. I have taken some pains to ascertain whether the same course was followed by my learned predecessor. A case has been found in the Registry where the property was more within the category of property in danger, than the property in this case, being money due in respect of freight, shares in railways and other companies, household furniture and cash. Although in that case there was quite as much or more than there is in this case to call for such a grant, and although an attempt was made with some success to show that the person who then had possession of the estate could not be trusted, because he had been convicted of an offence against the custom laws, Sir C. Cresswell refused the application with costs. I take it therefore that it is plain that the practice of the Ecclesiastical Courts and of this Court has been only to grant administration *pendente lite* in cases where necessity for the grant is made out. That being so, the defendant was wrong in applying for administration *pendente lite*, and the parties who applied to the Court of Chancery for a receiver were right. It would be improper to depart in this case from the practice hitherto followed in this Court, and I therefore refuse to appoint an administrator *pendente lite*. I have taken some pains to ascertain whether the rule of the Court of Chancery with regard to the appointment of a receiver is wider than the rule of this Court with regard to the appointment of an administrator *pendente lite*, and I think that it is. The rule of the Court of Chancery appears to be, that wher-

1865.

July 11 &amp; 18.

BELLEW

v.

BELLEW AND  
OTHERS.

1865. ever there is a *bond-fide* suit pending, the Court will appoint  
July 11 & 18. a receiver quite irrespective of the condition of the estate, or  
of the person who has the actual possession of it, on the  
BELLEW ground that while the suit is pending there is no one legally  
v. entitled to receive or to hold the assets, or to give discharges.  
BELLEW AND I wish to give notice that I shall in future assimilate the  
OTHERS. practice of this Court to that of the Court of Chancery, and  
that I shall grant administration *pendente lite* wherever the  
Court of Chancery would appoint a receiver; for I do not  
think it right that a party suing in this Court should be put  
to the inconvenience of making an application to the Court  
of Chancery when it is in the power of this Court to assist  
him. I must refuse this application; but I think, under the  
circumstances, that none of the parties ought to be con-  
demned in costs.



# CASES

IN THE

## COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

CODRINGTON v. CODRINGTON AND ANDERSON.

*Order for Particulars.—Sufficiency.—Adjournment by Reason of Surprise.—Charges by Respondent against Petitioner not established.—Costs against Co-Respondent.—New Trial.*

On summons for particulars of a charge of adultery, an order was made to give, at least ten days before the trial, particulars specifying dates and occasions, or the petitioner to be precluded from giving other than documentary evidence in support of certain charges of adultery. A statement, purporting to be particulars, was given, but with scarcely any specification of dates and occasions. At the trial evidence other than documentary was objected to, on the ground that the order for particulars had in substance not been complied with; but the Judge Ordinary held that the evidence was admissible, and that if the particulars were not sufficient, the proper course would have been to apply for further and better particulars.

Where an adjournment was granted on the ground of surprise, at the instance of the respondent, in respect of a charge of adultery with a person other than the co-respondent, it was granted on the understanding that the co-respondent should not be prejudiced as to costs by such adjournment.

The question of costs is in the discretion of the Court, in the circumstances of each case, and where the petitioner obtained a verdict

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July, August,  
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1865.  
Jan. Feb.

CODRINGTON  
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CODRINGTON  
AND  
ANDERSON.

establishing—1st, the adultery of the respondent and co-respondent; 2nd, the adultery of the respondent with a person other than the co-respondent; and 3rd, the petitioner's innocence of charges brought against him by the respondent; the Judge Ordinary, in the circumstances of the case, refused to condemn the co-respondent in costs other than those occasioned by the issue of adultery raised by his answer and found against him.

On motion for new trial it was urged that the Jury had been unfairly affected, as against the co-respondent, by the production of a draft or duplicate of a letter in the handwriting of the respondent, and found in her custody, there being no proof that the original or duplicate had been sent to, or reached, the co-respondent.

The JUDGE ORDINARY held that this ground for a new trial should have been founded on an affidavit from the co-respondent that he had not in fact received such original or duplicate.

This was a petition for dissolution of marriage by reason of the adultery of the respondent and co-respondent. The co-respondent traversed the adultery; the answer of the respondent raised a further issue of conduct on the part of the petitioner conducing to the adultery. The fourth paragraph of the petition was as follows:—"That during the years 1859, 1860, 1861, and 1862, the said Helen Jane Codrington was habitually and frequently visited by David Anderson, the Colonel of her Majesty's Second Regiment of Foot, at your petitioner's residence at Malta aforesaid, and that on divers of such occasions, which your petitioner is unable more particularly to set forth, the said Helen Jane Codrington committed adultery with the said David Anderson." There was also a charge of adultery with Lieutenant Mildmay, but he was not made a co-respondent. *S.C.* 3 Sw. & Tr. 368.

On the 16th of July, 1864, the following order was made on summons, at the instance of the co-respondent, for particulars:—"By order of this date it is ordered that unless the attorney for the petitioner do, not later than ten days before the trial of this cause, deliver to the attorney of the co-respondent particulars specifying the dates and occasions of the

“adultery charged in the fourth paragraph of the petition  
 “filed in this cause, the petitioner will be precluded from offer-  
 “ing at the trial of this cause, any evidence save documentary  
 “evidence, in support of the said fourth paragraph.” It was  
 stated on behalf of the petitioner that he was not then in  
 possession of any evidence as to Malta, except certain diaries  
 and other documents in the handwriting of the respondent.

On the 31st of May, 1864, the following statement was  
 handed to the co-respondent’s attorney :—

“The following are the particulars of the dates and occa-  
 “sions of the adultery charged in the fourth paragraph of  
 “the petition in this cause, delivered to the co-respondent  
 “pursuant to an order made in this cause, dated the 16th day  
 “of February, 1864. Petitioner abandons the charges of adul-  
 “tery against the respondent and co-respondent, for the years  
 “1859 and 1860, as alleged in the fourth paragraph of the  
 “said petition, but alleges that during the year 1861, 1862,  
 “and down to and inclusive of the twelfth day of May, 1863  
 “(upon which day the petitioner, respondent, and family, left  
 “Malta for England), the said co-respondent was the intimate  
 “friend and constant guest of the respondent, and that du-  
 “ring the whole of that period he was in the habit of almost  
 “daily and nightly visiting the respondent at petitioner’s  
 “house at Malta aforesaid, and accompanying her to and  
 “from balls, the opera-house, and other places at Valetta, and  
 “elsewhere at Malta, and meeting with her on her journey  
 “homewards from thence, and accompanying her to peti-  
 “tioner’s house aforesaid, and afterwards remaining with  
 “her till a late hour in the night, often after petitioner had  
 “retired to rest, and without his knowledge or consent; and  
 “on divers such occasions, which the petitioner cannot more  
 “particularly specify, the respondent committed adultery with  
 “the said co-respondent in your petitioner’s house at Malta,  
 “and in the cabin of the boat returning home across the  
 “water from Valetta; that on one occasion, late at night,

1864.

July, August.  
Nov. & Dec.

1865.

Jan. &amp; Feb.

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 CODRINGTON  
 v.  
 CODRINGTON  
 AND  
 ANDERSON.

1864. "which the petitioner cannot specify by date, save that it  
 July, August, "was on a night when there was an illumination at Malta,  
 Nov. & Dec. "the respondent and co-respondent committed adultery just  
 1865. "aside the Victualling Yard gate."  
 Jan. Feb.

CODRINGTON  
 v.  
 CODRINGTON  
 AND  
 ANDERSON.

The issues came on for trial before The Judge Ordinary,  
 by a special jury, on the 29th of July, 1864.

*Mr. Bovill, Q.C., Mr. Serjeant Ballantine, and Dr. Spinks*  
 for the petitioner.

*The Queen's Advocate (Sir R. J. Phillimore), Mr. Hawkins, Q.C., and Mr. Inderwick* for the respondent.

*Mr. Price, Q.C., and Dr. Swabey* for the co-respondent.

The petitioner's case was proceeded with on the 30th of July, when the depositions of certain witnesses examined under commission at the instance of the petitioner, at Malta, were tendered by Mr. Bovill.

*Mr. Price*, on behalf of the co-respondent, objected to this evidence on the ground that the particulars of the 31st of May were not only an insufficient compliance with the order of the 16th of February, but amounted in fact to no compliance at all, no more specific dates being given in the so-called particulars than in the paragraph of the petition. The petitioner is therefore bound by the proviso in the order which confines him to documentary evidence on this part of the case.

THE JUDGE ORDINARY: If no particulars had been given that would have been so. You say the particulars are insufficient; if so, application should have been made in Chambers for further and better particulars. I am quite clear this evidence is admissible.

Towards the end of sitting on the same 30th of July, a Mrs. Watson was called as a witness on behalf of the petitioner, and stated certain admissions and confessions of intercourse with Mr. Mildmay, made by the respondent to her, Mrs. Watson, when no other person was present, in terms and to an effect which Mrs. Watson said she had never uttered till she was in the witness-box.

At the sitting of the Court on the 1st of August, the respondent's counsel applied for an adjournment of the cause on the ground of surprise by Mrs. Watson's evidence.

Counsel for petitioner, *contra*.

THE JUDGE ORDINARY: I think I must grant the adjournment which is asked; it is an evil and inconvenience in itself, but if the cause went on now, and a verdict was found against the respondent, I should be bound to grant a new trial on the ground of surprise, which would be a still greater evil.

The cause was thereupon adjourned till Michaelmas Term, all parties agreeing to leave any difficulty arising from casualties in the Jury to the decision of the Judge, and it being understood that the co-respondent was not to be prejudiced as to costs by the adjournment.

The hearing of the case was proceeded with on the 17th, 18th, 19th, and 23rd of November, on which last day the jury found a verdict for the petitioner on all issues, and the Judge Ordinary pronounced a decree *nisi*.

A certain letter in Mrs. Codrington's handwriting, and proved to have been found in her desk, dated 27th of October, 1863, 82, E. S., was put in evidence as against her. It commenced, "What can I say to your letter?" it contained no name throughout, but it was suggested, and the internal evidence afforded by the letter, coupled with certain facts proved as to Colonel Anderson, showed that it was addressed to

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1864.  
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Colonel Anderson ; but there was no proof that the document itself, or any copy or duplicate of it, had ever reached Colonel Anderson.

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Jan. Feb.

—  
CODRINGTON  
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AND  
ANDERSON.

*Mr. Bovill* (*Serjeant Ballantine* and *Dr. Spinks* with him) for the petitioner, moved to condemn the co-respondent in costs.

*Mr. Price* (*Dr. Swabey* with him) for the co-respondent, *contrà* : The question of costs is entirely in the discretion of the Court, but in exercising that discretion the Court will consider the conduct of the petitioner as well as that of the co-respondent. Though the jury found that the petitioner had not been guilty of wilful neglect or misconduct conducing to the adultery, yet the evidence showed great carelessness on his part. At all events, the co-respondent ought not to be condemned in the costs occasioned by the proof of adultery with Lieutenant Mildmay, and by the charges brought by the respondent against the petitioner.

*Mr. Bovill* and *Dr. Spinks* in support of the motion : The case comes within the ordinary rule as to costs, namely, that where the adultery is proved against the co-respondent, he must pay all the costs incurred in consequence of that adultery. The only exceptions yet allowed to that rule are—first, cases in which the co-respondent did not know that the respondent was a married woman ; secondly, cases in which the co-respondent has already paid costs and damages in an action for *crim. con.* in a court of common law. It was held by the full Court, in *Badcock v. Badcock* and *Chamberlain*, 1 Swab. & Trist. 189, that remissness of the husband's conduct was no excuse for the co-respondent. It is an argument in mitigation when damages are claimed, but it is no answer to an application for costs. The jury negatived the charge that any conduct of the petitioner had conduced to the respondent's adultery. It was proved that she did not choose to adopt the mode of

life which her husband's official duties obliged him to adopt, and the co-respondent's conduct was without excuse. If the Court does not condemn co-respondents in the costs of countercharges contained in the answers of respondents, the result will be that in every case the co-respondent will set up his defence in the answer of the wife, and the husband will have to bear the costs.

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THE JUDGE ORDINARY: I must say that in my opinion the argument in support of this motion has been put on too high a ground. It has been assumed that in all cases in which the co-respondent has been found guilty of adultery, he must as a matter of course be condemned in costs. That argument, if well founded, would deprive the Court of the discretion expressly vested in it by the statute. If this is the first case in which the Court has been asked to exercise that discretion, the reason perhaps is that it is the first case in which that discretion could reasonably be exercised. I think it by no means follows as a matter of course that because a co-respondent is found guilty he must pay the costs. In dealing with the question of costs, it is necessary carefully to consider the conduct of the husband and wife, as well as that of the co-respondent. I will bestow careful consideration on the conduct of each of the parties in this case.

*Cur. adv. vult.*

*The Queen's Advocate (Mr. Hawkins and Mr. Inderwick* Jan. 17.  
with him) for the respondent, moved for a rule *nisi* for a new trial.

*Mr. Price (Dr. Swabey* with him) moved for a similar rule on behalf of the co-respondent.

Upon counsel commenting upon the undue effect, as against the co-respondent, which had been given to the letter in Mrs. Codrington's handwriting referred to above.

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July, August,  
Nov. & Dec.

THE JUDGE ORDINARY asked whether Colonel Anderson had made an affidavit that the original of that letter had not reached him, and was answered in the negative.

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v.  
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ANDERSON.

The following judgment sufficiently shows the grounds on which the rule was moved, and disposes of the question of costs.

*Cur. adv. vult.*

Feb. 14.

THE JUDGE ORDINARY gave the following judgment:—

In this case I feel bound to refuse a rule to show cause why a new trial should not be had. That this costly, protracted, and painful investigation should be gone through a second time, would be a grievous hardship on the petitioner; and the reasons which should induce the Court to subject him to it had need be weighty and conclusive.

On the part of Mrs. Codrington it was urged that the verdict was against the weight of the evidence, and much reliance was placed on the fact that the jury must have given credit to Mrs. Watson, whereas they ought, after certain contradictions she received, to have done the contrary. But this was essentially a matter within their peculiar province, and I must respect their decision. It was further argued that I had misdirected the jury because I had not remarked upon certain parts of the evidence so forcibly as it was thought they had deserved. This is a new head of misdirection, and one which if sustained as the ground of a new trial, would be likely to bring about a second trial in all cases of importance. For the weight to be given to the several facts and statements laid before a jury varies so much in the estimation of different minds, that anything like a common consent on the subject is not attainable.

On the part of Colonel Anderson it was argued that his identity as the man who drove with Mrs. Codrington to the Grosvenor Hotel was not established. But this man was taken up by Mrs. Codrington at the house where Colonel



Anderson was lodging; and Frank Strutt, the porter there, swore he saw Colonel Anderson get into a cab one evening about that time, and that there was a lady in the cab, whom he recognized as Mrs. Codrington. Again, it was urged that the copy of a letter purporting to be written by Mrs. Codrington to Colonel Anderson, which was necessarily laid before the jury as evidence against her, unduly and improperly biased the jury against him. Now if this letter was really sent to and received by him, he has no real ground of complaint that the jury should have drawn such conclusions as the letter warranted against him, as well as against her. Upon asking whether he had availed himself of the opportunity which the forms of the Court permitted, to make an affidavit that he never received that letter, I was told that he had made no such affidavit. And his counsel very properly from that moment argued the case on the supposition that he had received the letter. It would be of little avail to comment at length on the evidence by which the finding of the jury may be justified. It is enough that I can by no means say they were clearly wrong.

I have now to dispose of the question of costs. The 34th Section of the Divorce Act authorizes the Court in its discretion to cast the whole or any portion of the costs on the co-respondent. The discretion must bear on the special circumstances of each case, though in most cases those circumstances may present very uniform features.

But this is by no means an ordinary case. On the part of Colonel Anderson it was argued that the petitioner's conduct to his wife, though the jury found that it did not amount to such neglect as to bar his divorce, was yet by no means free from blame. It was urged that for years he had suffered, if not enforced, his wife to absent herself from his bed at night, and lead a separate life by day.

Further, that when they did go out together into society, the petitioner was in the habit of leaving his wife to come

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home alone at night, and that she did so night after night, at a very late hour, in the company of Colonel Anderson, of all which the petitioner was aware.

It was also pointed out that James Tuck, the petitioner's valet, who spoke to many acts of gross familiarity with Lieutenant Mildmay, when asked why he had not mentioned what he had seen, replied "that he thought Admiral Codrington 'knew all about it,'" and "that he must have known it." And further, that evidence was not wanting to prove that the Admiral had withdrawn himself from his wife advisedly, saying that he did not want to have any more children.

It was also clear on the evidence that the intrigue with Lieutenant Mildmay preceded Mrs. Codrington's intimacy, if not her acquaintance, with Colonel Anderson.

The facts gave rise to much very able reasoning on Colonel Anderson's behalf, to the effect that the costs incurred by the petitioner in obtaining a divorce ought not to be borne by the co-respondent.

But to some portions of that reasoning as applied to the question of costs, various answers suggest themselves, and other portions depend on the degree to which the facts relied upon were credibly established in proof.

The Court is by no means prepared, therefore, to adopt it without qualification; and while it cannot on the one hand deny that the conduct of the petitioner has been such as to invite reasonable challenge, it cannot on the other hand go the length of absolving Colonel Anderson from the costs of proving against him the adultery which he has chosen to put in issue.

The Court therefore condemns him in those costs, but it will go no further. He will not have to bear the costs of Mrs. Codrington, nor the costs of the petitioner in proving the case against her in respect of Lieutenant Mildmay; nor the costs of the adjournment, which arose entirely on that branch of the case.

(Before THE JUDGE ORDINARY, and, on appeal, before the Full Court—THE JUDGE ORDINARY, MELLOE, J., and PIGOTT, B.)

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January 19.  
GARSTIN  
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GARSTIN v. GARSTIN.

*Absolute Appearance.—Plea to the Jurisdiction.—Party in Contempt.—Practice.*

A respondent who appears absolutely thereby admits the jurisdiction of the Court, and cannot afterwards amend his appearance in order to plead to the jurisdiction.

The Court will not hear a party who is in contempt for any purpose except that of purging his contempt.

This was a petition by a wife for a judicial separation. The citation and a copy of the petition were served on the respondent in Jersey on the 18th of July, 1864, and on the 25th of July his solicitors entered an absolute appearance on his behalf.

*Dr. Tristram*, for the respondent, moved for leave to amend the absolute appearance, by substituting for it an appearance under protest, in order to enable him to plead to the jurisdiction. Affidavits were filed in support of the motion, in order to show that the respondent was domiciled in Jersey, and was not subject to the jurisdiction of this Court. November 3.

*Mr. Thrupp* opposed the motion, and cited *Donegal v. Donegal*, 3 Phil. 609; *Chichester v. Donegal*, 1 Add. 18; *Zycklinski v. Zycklinski*, 2 Swab. & Trist. 420; *Forster v. Forster and Berridge*, 3 Swab. & Trist. 144.

THE JUDGE ORDINARY: Sir C. Cresswell having, in *Forster v. Forster and Berridge*, refused to allow the respondent, who had appeared absolutely to amend her appearance, and enter an appearance under protest, I feel myself bound by his opinion, though I have some doubt upon the question. I shall therefore refuse the application. *Motion rejected.*

1865.  
January 19.  
GARSTIN  
v.  
GARSTIN.

The respondent having given notice of appeal, the question came on for argument on the 10th of January, 1865, before the full Court.

*Dr. Tristram* for the appellant.

*Mr. Thrupp* for the wife. The appellant is in contempt, and therefore cannot be heard. After the suit commenced, the respondent took from the petitioner her youngest child, which was under the age of two years, and the Court ordered him to deliver it up to her. Upon his refusal to do so, the Court issued an attachment against him, whereupon he left England, taking the child with him. Until he has complied with the order of the Court, he can only be heard for the purpose of purging his contempt. He cited *Ricketts v. Mornington*, 7 Sim. 200.

*Dr. Tristram*: If the Court has no jurisdiction to make the order, the respondent cannot be in contempt for not obeying it. He has, therefore, a right to raise the question of jurisdiction, notwithstanding his contempt. This being a suit for judicial separation, the Court is bound to follow the practice of the Ecclesiastical Courts, and those Courts were prevented from making any order in a suit while an appeal was pending, by an inhibition issued by the Court of Appeal. [THE JUDGE ORDINARY: An appeal from the Ecclesiastical Court would carry the case out of the Court below into the Court of Appeal. Here the appeal is to the same Court, the Court for Divorce and Matrimonial Causes.] When the Judge Ordinary hears a cause of judicial separation, he does not sit in the full Court. [THE JUDGE ORDINARY: All the acts of the Court are the acts of the Court for Divorce. There is but one Court, certain powers being wielded by the Judge Ordinary alone, and certain other powers being wielded by the Judge Ordinary with other members of the Court.]

*Mr. Thrupp* replied.

THE JUDGE ORDINARY: I am of opinion that the course which the appellant proposes to take is not in any way conformable to the practice of the Court. The respondent has appeared absolutely, and unless that appearance is got rid of, he has subjected himself to the jurisdiction of the Court. After that appearance had been entered, certain orders were made for the purpose of compelling the respondent to give up the custody of his child, and he has chosen not to obey those orders. He has applied to have those orders rescinded, and it was intimated to him that if he was prepared to submit to the authority of the Court and bring back the child within its jurisdiction, his application should be heard. He now applies to the full Court to be allowed, as a matter of indulgence, to withdraw his appearance. I am of opinion that while he sets the authority of the Court at defiance, he cannot be heard in support of that application. The appeal may stand over, and it will be heard as soon as the respondent has put himself in a position to have it heard.

MELLOR, J., and PIGOTT, B., concurred.

*Appeal stayed accordingly.*

1865.  
January 19.  
GARSTIN  
v.  
GARSTIN.

SHELDON v. SHELDON (The Queen's Proctor intervening).

January 28.

*Practice.—Dismissal of Petition.—No Evidence produced.*

SHELDON  
v.

The Queen's Proctor intervened in a suit for dissolution in which the respondent did not appear, and alleged collusion and the petitioner's adultery. No evidence being tendered in support of the petition, when the case came on for hearing the Court dismissed the petition, without requiring evidence to be produced in support of the Queen's Proctor's plea.

SHELDON  
(the Queen's  
Proctor  
intervening).

This was a wife's petition for dissolution of marriage, on the ground of adultery, coupled with cruelty.

1865.

The respondent did not appear.

January 28.

SHELDON  
v.  
SHELDON  
(the Queen's  
Proctor  
intervening).

The Queen's Proctor had intervened, and traversed the petitioner's allegations of cruelty and adultery, and charged the petitioner with collusion and also with adultery with John Thomas Browne. Issue had been joined on these pleas, and the cause came on for hearing before the Judge Ordinary without a jury.

*The Solicitor-General* (Sir R. P. Collier) (*Dr. Spinks* with him) for the Queen's Proctor. He had no evidence in support of the charge of collusion, but had evidence which established the charge of adultery against the petitioner. If no evidence is tendered in support of the petition it will probably be unnecessary to produce it.

No one appeared on behalf of the petitioner.

THE JUDGE ORDINARY: The object of the Queen's Proctor's intervention is to prevent the petitioner from obtaining a decree if the allegations in the petition are proved. Unless evidence is produced upon which a decree can be founded, it is unnecessary to produce evidence in opposition to the decree. As no one appears on behalf of the petitioner to offer any evidence in support of the petition it must be dismissed.

*Petition dismissed.*

January 31.

NARRACOTT v. NARRACOTT AND HESKETH.

NARRACOTT  
v.

*Settlement of Damages.—Order.—Application for Amendment.*

NARRACOTT  
AND HESKETH.

Where the Court, on pronouncing the decree *nisi*, had directed the damages to be invested, and the annual income arising from them to be paid to the respondent "*dum casta vixerit*," and the decree had been made absolute :

HELD, that it was too late afterwards to apply to the Court to amend the order by inserting in it, after the words "*dum casta*," the words "*et sola*."

1865.  
January 31.

NARRACOTT

v.

NARRACOTT

AND HESKETH.

In this case, the jury having found that the respondent had been guilty of adultery with the co-respondent, and having assessed the damages against him at £2500, the Judge Ordinary, on the 3rd of May, 1864, pronounced a decree *nisi*, condemned the co-respondent in the costs of the suit, and directed that such costs as should not be recovered from him should be defrayed out of the damages, and that the surplus thereof should be invested in the names of two trustees to be held by them in trust to pay the income arising therefrom to the respondent during her natural life, *dum casta vixerit*.

On the 3rd of November, 1864, the decree *nisi* was made absolute.

*The Solicitor-General* (Sir R. P. Collier) (*Mr. Beresford* with him) moved for the order to be amended by inserting after the words "*dum casta*" the words "*et sola*." A settlement had been prepared to carry out the order contained in the decree, and the respondent claimed to be entitled under the terms "*dum casta vixerit*" to a life-interest in the fund, even if she were to marry again. The co-respondent had already settled £160 a year on her. She would be entitled to a further income of between £200 and £300 a year on her mother's death, and the Court could never have intended her to enjoy the annuity in the event of her marrying again.

*The Queen's Advocate* and *Mr. Pritchard* for the respondent. The application comes too late. The order must be strictly followed.

THE JUDGE ORDINARY: I think I ought not to interfere. If at the time when the order was made the addition of the words "*et sola*" had been suggested, their insertion would

1865. have been a proper subject for consideration, and I by no  
 January 31. means say that I should not have directed them to be in-  
 NARRACOTT inserted. But it is now too late for me to alter the order.  
 v.  
 NARRACOTT  
 AND HESKETH. *Motion rejected.*

[*Note.*—Compare the terms of the order in *Fisher v. Fisher*, 2 Swab. & Tris. 410, where the dissolution was obtained on the wife's petition.—REF.]

January 31.

HOLLAND v. HOLLAND.

HOLLAND  
 v.  
 HOLLAND.

*Non-compliance with Order for Payment of Costs.—Inability of Husband to pay.—Attachment refused.*

The Court refused to grant an attachment against a husband for non-payment of certain costs incurred on behalf of the wife in a suit instituted by her for judicial separation on the ground of his alleged cruelty, where, on his uncontradicted answer, it appeared that the husband had been compelled to separate from her several months before the institution of the suit in consequence of her drunkenness and violence, and had not the present means of complying with the order for payment.

This was an application for an attachment against the respondent for non-compliance with an order of the Court, dated the 5th June, 1863, requiring him to pay the two sums of £12. 1s. 6d. and £5. 1s. 4d. to the petitioner's solicitor, being her taxed costs in this suit. The petition, which was for a judicial separation on the ground of cruelty, was filed by the wife on the 16th of March, 1863. The respondent filed an answer on the 16th of April, 1863, denying the cruelty charged, and alleging that since the year 1857 the petitioner had been a drunkard, had been very violent in her conduct towards him, and had frequently assaulted him and



wantonly destroyed his furniture; that she had been bound over to keep the peace towards him and had been committed to prison for assaulting him, and that by reason of her conduct he had been compelled to separate from her on the 22nd of April, 1862, and had since lived separate from her, allowing her 6*s.* a week towards her support.

To this answer no reply had been filed, and no further proceedings had been taken by the petitioner in the cause.

An affidavit of the respondent was also read in opposition to the application, by which it appeared that he was employed in a soda-water and ginger-beer manufactory, and that his wages and earnings in the winter averaged 25*s.* and in the summer 35*s.* per week; that he had two girls of the respective ages of ten and fourteen years at a boarding-school at the cost of 12*s.* per week; that he had allowed his wife since the institution of the suit 5*s.* per week, and that for his own lodging he paid 4*s.* 6*d.* per week; that out of the residue of his earnings he had barely sufficient to support himself, and that he gave his wife the greater part of his furniture when they separated, and that he had been unable to pay the costs since the order had been made, or he would willingly have paid them.

*Mr. Vigors* moved for an attachment.

*Mr. Shaw, contra*: After reading the affidavit above referred to, he submitted that, as the result of putting in force the attachment against the respondent would be to deprive him of the means of supporting his children and wife, the order ought not to be made. He cited *Ward v. Ward*, 1 Swab. & Tris. 484; *Fitzgerald v. Fitzgerald*, 2 Lee, 263; and *Wise v. Wise and Wells*, Pritchard's Div. Prac. 267.

THE JUDGE ORDINARY: Does the petitioner desire to file an affidavit in answer to the one read?

1865.  
January 31.  
HOLLAND  
v.  
HOLLAND.

1865. *Mr. Vigors*: No. The statements in it cannot be denied.  
 January 31.  
 HOLLAND THE JUDGE ORDINARY: Upon this affidavit I must decline  
 v. to grant an attachment. *Motion rejected.*  
 HOLLAND.

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## HYDE v. HYDE.

1865. *Judicial Separation.—Permanent Alimony.—Order to secure*  
 February 21. *by Deed rejected.*

HYDE  
 v.  
 HYDE.

The order of the Ecclesiastical Court for permanent alimony was an order for payment of a certain part of the husband's actual income, the amount of which might be varied according to his change of means, and the nature of this order is not altered, as regards alimony on judicial separation, by the Divorce Act.

The Court refused to make an order on the husband to execute a deed charging stock with a yearly sum equal to the amount of permanent alimony allotted.

The Court has more extensive powers of enforcing its decrees than the Ecclesiastical Court had.

This was originally the wife's petition for judicial separation by reason of the husband's adultery. The decree was made in June, 1859, and in July, 1859, permanent alimony at the rate of £120 had been allotted, which was paid till 1863. In March, 1864, a writ of attachment was issued against the respondent, the return to which was *non est inventus*, and in June, 1864, a writ of sequestration issued against his property. The sequestrator had paid certain sums of money into the registry of the Court in obedience to this writ, and on the 14th of February, 1865, the writs were discharged by order of the Court upon payment of the arrears due, with interest and costs.

*Mr. Pritchard* now moved, on behalf of the petitioner, for

an order on the husband to execute a deed charging his life-interest in certain stock with the payment of the £120 yearly decreed as permanent alimony. It appears on affidavit that the respondent had sold certain stocks admitted by the answer to the petition for alimony to have been then in his possession. If nothing can be done to secure part of the property for the wife's alimony, it will be made away with. I admit the application is without precedent; but the 17th and 22nd sections of the Divorce Act, 20 & 21 Vict. c. 85, give the power.

1865.  
February 21  
HYDE  
v.  
HYDE.

*Dr. Spinks and Mr. Everitt, contra:* The Ecclesiastical Court had no such power to enforce its decree for alimony. On comparing the case of *Pratt v. Bull*, 7 L. T. Rep. N. S. 378, *S. C.* 32 L. J. Ch. 144, with that of *Ex parte Holden*, 7 L. T. Rep. N. S. 791, it may be that the end sought for may be obtained elsewhere; but this Court has no power to make what is in fact a charging order. If this motion is rejected, it ought to be rejected with costs.

THE JUDGE ORDINARY: I by no means concede the proposition that this Court has no other power to enforce its orders than the powers which the Ecclesiastical Court had. The 52nd section of the Divorce Act clearly states that all decrees and orders of this Court shall be enforced and put in execution in the same or like manner as the orders of the High Court of Chancery. But I am of opinion that the nature of orders for alimony is in nowise intended to be altered, and that this Court was intended, in cases of alimony on judicial separation, to make orders of the same nature as those made by the Ecclesiastical Court. If the order of the Ecclesiastical Court had been to secure to the wife, as long as she lived, a yearly sum, irrespective of the husband's future fortunes, this Court might have contrived to give effect to such an order; but the order of the Ecclesiastical Court was, that the hus-

1865.  
February 21.

HYDE  
v.  
HYDE.

band, having regard to his actual circumstances, should make his wife a certain allowance, which might be increased or diminished with the varying fortunes of the husband. An order charging the husband's property with the payment of a fixed sum by way of alimony would alter its character altogether, would affect the husband's property in a different way, and tie up his hands from engaging in business. Thus the question is not one of the power of this Court to enforce its orders, but rather of the nature of the order itself, which, I think, has been misapprehended. The motion must be refused; and I should have refused it with costs if the husband had acted differently with regard to the payment of the alimony as it became due.

1865.  
March 9.  
ROGERS  
v.  
ROGERS.

# ROGERS v. ROGERS.

## *Wife's Costs.—Unfounded Suit.—Deposit of Money in Registry.*

In a suit by the wife for judicial separation, an application was made in chambers for the usual order for the payment by the respondent of the petitioner's taxed costs, incurred previous to the hearing, to her attorney. Affidavits were filed showing that the petitioner had been living in open adultery for several years before the petition was filed, and up to the date of the petition.

The Court, having reason to believe that the suit was not instituted *bonâ fide*, but for the purpose of obtaining costs from the husband, refused to make the usual order for the payment of costs to the petitioner's attorney, but directed that they should be paid into the Registry to abide the event of the hearing.

This was the wife's petition for judicial separation, on the ground of the husband's adultery and cruelty. The husband, by his answer, denied these charges, and alleged adultery against the petitioner.

The marriage took place in 1838, and the parties had not lived together since 1851.

A summons was taken out for the payment to the petitioner's attorney of the taxed costs of the suit up to the time of hearing. The application was opposed before the Judge Ordinary in chambers on the part of the respondent upon affidavit, showing that the petitioner had lived in open adultery with different men from the time of the separation up to the time of filing the petition; that she was a notorious drunkard, and had been in the custody of the police for drunkenness and for assault.

It was contended that the petition ought never to have been presented; that the only object of presenting it was to obtain costs from the respondent, and that no order ought be made for payment of the costs until the Court had heard the evidence in the case. The respondent was willing to deposit the amount in the Registry, to be disposed of as the Court should direct after the hearing. It was admitted that there was no precedent for refusing the order for which the petitioner applied. The Judge Ordinary adjourned the summons for a week, to give the petitioner an opportunity of answering the affidavits. On the 21st of February the adjourned summons was called on, and no affidavits being filed on behalf of the petitioner, and no one appearing for her, the Judge Ordinary ordered that the costs should be deposited in the Registry until further orders.

When the issue came on for trial before the Judge Ordinary, by a common jury, a witness was called on behalf of the petitioner, who failed to prove any of the allegations in the petition; but who proved, on cross-examination, that the petitioner had been guilty of adultery.

*Mr. J. P. Campbell* and *Mr. J. Mew* for the petitioner.

*Dr. Swabey* and *Mr. Searle* for the respondent.

1865.  
March 9.  
—  
ROGERS  
v.  
ROGERS.

1865.  
 March 9.  
 ———  
 ROGERS  
 v.  
 ROGERS.

*Mr. J. P. Campbell*: I knew nothing of the case till our briefs were delivered. As we have no more witnesses, we cannot proceed further with it.

THE JUDGE ORDINARY: You have only done your duty. The case is a disgraceful one. It has been pending a long time, and has been postponed on a variety of pretences, and there is every indication that the filing the petition is an abuse of the process of the Court.

*Verdict for respondent. Petition dismissed.*

No order was made as to costs, as the order for the deposit of costs in the Registry had not been drawn up, and therefore no money had been deposited by the respondent.

1865.  
 March 14.  
 ———  
 BANCROFT  
 v.  
 BANCROFT.

BANCROFT v. BANCROFT.

*Judicial Separation.—Cross-Suit for Dissolution.—Decree.*

A judicial separation was decreed on a verdict establishing the husband's cruelty, though an issue in a cross-suit as to the wife's adultery was still pending.

In a petition by a wife for a judicial separation on the ground of her husband's cruelty, to which he answered by a traverse and a charge of adultery, the petitioner obtained a verdict on both issues.

A petition by the husband for dissolution, in which the same adultery was in issue, was tried by a special jury before the Judge Ordinary, and the jury were discharged, being unable to agree on a verdict.

*Dr. Spinks* moved for a decree of judicial separation on the verdict obtained by the wife on that suit.

1865.  
March 14.

BANCROFT  
v.  
BANCROFT.

*Dr. Swabey* : A charge of adultery against the wife is still pending, and if she is found guilty she will not be entitled to any relief from this Court. No decree, therefore, should be pronounced till that charge is decided.

*Dr. Spinks* : The effect of the verdict in the cross-suit, if against her, can be considered when it is delivered ; but the verdict she obtained in her suit entitled her to a decree immediately it was found by the jury, without reference to the cross-suit.

*Cur. adv. vult.*

THE JUDGE ORDINARY : A motion was made last week for a decree in this case. The question is, whether the pendency of the suit by the husband is or is not a legitimate bar to the decree to which the wife would otherwise be entitled in her suit. After consideration, I am of opinion that it is not. I think the Court would not be justified in holding its hand and refusing the wife a decree on the verdict she has obtained, unless by so doing it would prejudice the right of the husband to the relief to which he may be entitled in the event of his succeeding in his suit. His right would not be prejudiced by such a decree, for, notwithstanding that decree, the Court might hereafter pronounce a decree of dissolution in the suit instituted by him. The conclusion at which the jury have arrived in this suit entitles the wife to a decree of judicial separation, which I therefore make.

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1865.

February 6  
and March 7.F— (falsely  
called D—)v.  
D—.

F— (falsely called D—) v. D—.

*Woman's Suit for Nullity.—Impotence.—Triennial Cohabitation.—Evidence.*

When the Court is satisfied by other evidence, *e.g.*, that of the petitioner herself, of the man's impotence, the rule of apparent virginity after cohabitation of three years does not apply. In the present case the man did not appear, and did not submit to the order for inspection; the medical evidence was not conclusive as to the woman's virginity, but the Court, on her evidence on affidavit, took it to be proved, first, that the marriage was never consummated; secondly, that this was owing to the impotence of the man; thirdly, that the physical appearance of the woman was to be accounted for otherwise than by consummation; and pronounced its decree of nullity of marriage.

This was a petition by the woman for declaration of nullity of marriage by reason of the man's impotence. The case is of importance, as being the first which has ascertained the principle on which the Court no longer holds itself bound by the old rules of triennial cohabitation.

The respondent was personally served with the copy of the petition and citation, and with the order of the Court to submit to medical inspection, but he neither appeared nor obeyed the order as to inspection.

The marriage was celebrated on the 18th of April, 1861, the petitioner being then thirty-eight years of age, and the respondent twenty-six.

The report of Dr. Burrowes and Dr. Farre as to the condition of the petitioner was "that there was no malformation "nor impediment on her part to prevent the act of generation, "but we cannot determine whether she is a virgin."

By leave of the Court the evidence of the petitioner was given on affidavit to the following effect:—

"That on the afternoon of the marriage apartments were



“engaged at a certain hotel, and then at respondent’s desire,  
 “who stated that he wished to see the town, we walked about  
 “for nearly three hours, and returned to the hotel about eight  
 “p.m. During the remainder of the evening the respondent  
 “became and continued to be very dull and abstracted and  
 “silent, which he had not been previously, or at any former  
 “period of my acquaintance with him. That he showed  
 “and expressed reluctance to retire to our bedroom, which  
 “adjoined, and consequently we were very late in going to  
 “bed, and when at length he followed me into the bedroom,  
 “and I was in bed, he dawdled for a long time about the room  
 “before he came into bed. When we were in bed together  
 “the respondent caressed me, but with a total absence of that  
 “warmth of manner which he had theretofore shown towards  
 “me, and then expressed his desire that we should not have  
 “any sexual intercourse for three months or so, and alleged as  
 “his reason, that it would be better to defer it, because in  
 “case we should have any family at an early period, it might  
 “he said that there had been intimacy between us before  
 “our marriage, or to that effect; but the respondent after-  
 “wards, during that night, endeavoured to have sexual inter-  
 “course with me, but entirely failed in so doing, owing, as I  
 “believe, to his total want of power for that purpose. That on  
 “more than one occasion during the following day the respon-  
 “dent again endeavoured to consummate our marriage, but  
 “entirely without effect. That the respondent before coming  
 “into contact with me, used to excite himself by violently  
 “rubbing his private parts with his hand, and generally did  
 “so whenever he made any attempt during the time I lived  
 “with him. That we remained at the said hotel for a week,  
 “and another week or ten days in lodgings in the same town :  
 “the respondent made other useless attempts, and excused  
 “himself by saying he was not strong enough, but he should  
 “be better and stronger in the winter, although I believe the  
 “respondent was at that time in a very good state of health.

1865.

February 6  
and March 7.

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 F— (falsely  
 called D—)  
 v.  
 D—.

1865.  
February 6  
and March 7.

F— (falsely  
called D—)  
v.  
D—.

“The respondent asked me not to tell my mother that he had not had intercourse with me: he also asked me if I could love him as I did then if he could never do anything for me, or to that effect. . . . At times he tried to make me believe that he had the power to move in the way of consummating our marriage, if he would exercise it. We next went to my father’s house in London, when, in consequence of an inquiry by my mother, who had observed that I was low-spirited, I told her that nothing in the way of consummation had taken place. Thence after a few days we went to respondent’s house in the country, where he on several occasions renewed his attempts but failed, and on such failures would shed tears and become silent and depressed. Upon several occasions he tried to do with his hand what should have been done otherwise, but I used to feel afraid of him, when so trying to use his hand, and would get away from him. In August, 1861, my father and mother came to stay near us; my mother asked me how matters were going on. I answered that the marriage had never been consummated; I believe my mother mentioned the fact to respondent’s mother, who suggested that it was owing to some fault or impediment on my part. I was much annoyed and distressed at this, knowing, as I did, that the real reason was the incapacity of the respondent. On my father and mother’s return to London I went there by their desire for the purpose of being examined. I told the respondent that such was my intention, but he made no reply. I told the respondent’s mother in his presence that there had been no marriage between us, and that I was going to London to be examined, and to undergo any operation that might be necessary to remove any impediment on my part, but the respondent remained silent. The respondent went with me to London, where he remained from the Saturday afternoon to the following Monday. An appointment had been made for Dr. Burrowes on the Monday morning. I was exa-

" mined by him, and he stated and certified in writing that  
 " there was no inability on my part. The respondent left the  
 " house when Dr. Burrowes came, and did not return for  
 " three or four hours. I remained in the country with the  
 " respondent till the month of February, 1862, with the ex-  
 " ception of occasional visits. In February, 1862, I came  
 " alone on a visit to my parents for about five weeks, then  
 " returned to the respondent, and continued to live with him till  
 " the 2nd of September, 1862. On my return from London  
 " the respondent asked me to promise that I would not tell my  
 " mother, or divulge anything that passed between us in bed  
 " for the future. On the anniversary of my birthday in  
 " January, 1862, when in bed the respondent said: 'I hope  
 " 'you may be happier this time next year, for it is no happi-  
 " 'ness for you or pleasure to me to be going on as we now  
 " 'are,' or to that effect: alluding, as I believe, to his re-  
 " peated failures in attempting to consummate our marriage,  
 " and during our cohabitation he has several times said to me  
 " that I deserved a better husband than he could ever be to  
 " me. During the whole time of cohabitation useless attempts  
 " were repeated by the respondent. On the evening of the 1st  
 " September, 1862, the respondent and I were at his father's  
 " house, when, in consequence of some remarks and observations  
 " disparaging to me and my family, and eulogizing the respon-  
 " dent as a husband, made to me by respondent's mother in his  
 " presence, I expressed my determination to go on the following  
 " morning to my father, who was then staying out of London,  
 " and I was induced to do so not only by what then passed,  
 " but by the fact that at that time I felt myself very ill and  
 " unhappy in mind: that the respondent went with me home  
 " from his father's house that night, but did not, as I believe,  
 " utter a syllable to me on the way home or during the night.  
 " On the 2nd of September, 1862, I accordingly went alone  
 " to my father, without any objection or remonstrance on the  
 " part of the respondent, and I have never seen him since,

1865.

February 6  
and March 7.F— (falsely  
called D—)v.  
D—.

1865. "although I knew he was in London when I went there with  
 February 6 "my parents in November, 1862. After, when I so left the  
 and March 7. "respondent, and for long afterwards, I was in a delicate state  
 F— (falsely "of health, caused by disappointment and unhappiness, and  
 called D—) "have been very reluctant to meet the exposure incident to  
 v. "adopting the proceedings in this suit, which, however, by the  
 D—. "advice of my family, I have now done."

The petitioner's case was conducted by *Dr. Spinks* and *Mr. T. Jones*.

The petitioner's father was examined, and his evidence corroborated the facts stated by her affidavit so far as the circumstances admitted, and he deposed strongly as to the miserable state she was in when she came to her parents in September, 1862. In answer to questions by the Court, he said :—

"She came of her own accord, saying that she could not remain any longer with him, from the treatment she had received. I did not press her as to the nature of the ill-treatment. She said he was stingy, and gave her no money for housekeeping. I understood she had had some altercation with her husband's mother on the evening before she came away. She continued ill, and was attended by Dr. Burrowes. After a little time, I urged these proceedings as the only thing to be done to relieve her from the position she was in. I believe she has never seen her husband since September, 1862. He knew where she was, but did not correspond with her as far as I know, nor did he write to any member of her family as to her returning to live with him."

Dr. Burrowes gave evidence as to the examination of the petitioner in August, 1861, and under the order of the Court. In answer to questions by the Court, he said :—

"I could not state from that examination whether intercourse had or had not taken place. I only examined as to

her capacity. I should now say that the physical signs of virginity are not present to the extent they sometimes are; for aught that appeared, intercourse might have taken place. The outward signs of virginity may be destroyed otherwise than by intercourse."

In answer to questions by the counsel,—

"The petitioner has on two occasions made a statement in relation to that. I did not see the husband. It is consistent with medical experience that continued unsatisfied expectation of intercourse, when naturally expected as between husband and wife, would be hurtful to the health of the female."

Dr. Farre was also examined.

*Dr. Spinks* for the petitioner: Though the medical evidence of virginity is not conclusive, and the cohabitation has been short of three years, yet I submit, if the Court is satisfied of the impotence of the husband, the petitioner is entitled to the decree she prays. The old rule of the Ecclesiastical Court which, where there was no proof of the man's apparent impotence, required proof of virginity after 'three years' cohabitation, was adopted as the best and safest means of proof when the law of evidence was very different from what it now is. The Court has now the evidence of the parties themselves. In point of fact, the rule has not of late years been strictly upheld in the Ecclesiastical Court, and I submit that in the present state of the law of evidence it is altogether unnecessary: *Greenstreet v. Cumyns*, 2 Phill. 20; *A. (falsely called B.) v. B.* 1 Eccl. Adm. 12; *G. (falsely called T.) v. T.* Ib. 389. In *Pollard v. Wybourn*, 1 Hagg. 729, the Court gave great weight to the man not appearing in the suit after personal service.

*Cur. adv. vult.*

THE JUDGE ORDINARY gave the following judgment:—  
This was a suit of nullity of marriage, promoted by the wife

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February 6  
and March 7.  
F— (falsely  
called D—)  
v.  
D—.

March 7.

1865.  
February 6  
and March 7.

F— (falsely  
called D—)  
v.  
D—.

on the ground of the impotency of the husband. The husband did not appear, and refused to submit to inspection.

The inspectors report with respect to the wife, that there are no certain signs of virginity, and that the physical appearances are consistent with the marriage having been consummated or not. The cohabitation was far within the triennial period. After about seventeen months the wife left her husband in broken health and returned to her father, apparently suffering in mind and body. The husband does not appear to have reclaimed her, or made any inquiries after her. At the time she thus left her home she had other causes of complaint besides that which she now proffers, namely, her husband's meanness with respect to money, and some insinuations against her father, which she alleged to have been made to her by the respondent's mother.

But the question as to the husband's capacity had arisen long before this; within four or five months after the marriage conversations had taken place between the petitioner and her parents, which had resulted in her coming to London to be examined by Dr. Burrowes, who then reported her condition to be the same as the inspectors report now. The respondent at that time declined not only inspection, but even conversation with Dr. Burrowes.

The remaining evidence in the case may be summed up in a few words. The wife has made a long affidavit, detailing the conduct of the husband to her during the cohabitation. If this affidavit is to be believed, it proves beyond doubt three things: first, that the marriage was never consummated; secondly, that this was owing to the impotency of the husband; and, thirdly, that the present physical appearances are to be accounted for otherwise than by consummation.

Before the law of evidence was altered by admitting both parties to tell their own tale, the matrimonial tribunal stood in a very different position from what it now occupies in relation to cases of this delicate and critical character.

Except the answer upon oath of the accused party, the sole means of judgment were the outward and bodily signs revealed on medical inspection. This condition of things had at least one merit, if it had greater defects. Its merit lay in this, that it became very difficult for a woman to approach the Court, save with those cogent signs of virginity which constituted reliable proof that the marriage had really never been consummated. And this was surely a merit, for it saved the Court from possible imposition upon this fact, and limited the number of such suits to those rare cases in which, from some cause or other, no sexual intercourse had taken place.

On the other hand, it had the great defect of oftentimes leaving the fact of impotence, which is the very foundation of the suit, to such presumptions as might be gathered from the condition of the wife or the silence of the husband. But now both parties can speak on oath, explain what they cannot deny, dispel and rebut inferences, while they admit facts; and the Court judges in a broader and fuller light.

The Ecclesiastical Courts have gone quite far enough in cases of this kind, and I am by no means prepared to go farther. But, for the reason just stated, it is no answer to the petition in this case to say that, under the old system, it could not have succeeded. No one can help feeling that the single oath of the party interested, fortified by nothing stronger than the silence of the party charged, is treacherous ground for judicial decision; but no one can deny that, if this lady's story is true, her condition is one of grievous hardship. And to call for corroboration, where all corroboration is, from the nature of the subject, impossible, would be harder still.

I have no alternative, then, but to examine and adjudicate upon the petitioner's truth, or to close the door of the Court against her altogether, be her story never so true. I accept the former, and pronounce myself entirely satisfied that this

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February 6  
and March 7.F— (falsely  
called D—)  
v.  
D—.

1865. marriage has never been consummated, and that the respondent is incurably impotent.

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and March 7.

F— (falsely  
called D—)  
v.  
D—.

There remains the rule as to triennial cohabitation; this rule only applies when the impotence is left to be presumed from continued non-consummation; for when the impotence is clearly proved *aliunde*, the Court has never resorted to it. The present case falls rather within the latter class; for, if I may rely upon the petitioner's oath, the impotence is beyond a doubt; and if I cannot rely upon her oath, I shall have no better ground for doing so by putting her to repeat the same story at the end of another eighteen months' cohabitation. The Court, therefore, pronounces the marriage void.

January 10, 24,  
and 31.

CARRYER v. CARRYER AND WATSON.

CARRYER  
v.  
CARRYER AND  
WATSON.

*Husband's Petition.—Co-Respondent.—20 & 21 Vict. c. 85,  
s. 28.*

The petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-respondent, unless he is excused from so doing by the Court on special grounds. Query, whether the fact that the petitioner can only obtain evidence admissible against the respondent, but inadmissible against the alleged adulterer, would be such special ground?

This was the husband's petition for dissolution of marriage.

The petition alleged that on divers occasions between the 1st of January, 1858, and the 1st September, 1864, and in September, 1864, the co-respondent Watson had committed adultery with the respondent. It also alleged that Charles Manning, at the date of the petition residing at Natal, in Africa, had, on divers occasions between the 7th of October, 1856, and August 1862, committed adultery with the respondent. Watson had been made a co-respondent, and had filed



an answer traversing the charge against him. A citation had not been served on Manning.

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and 31.CARRYER  
v.CARRYER AND  
WATSON.

*The Queen's Advocate* (Sir R. J. Phillimore) and Dr. Deane, Q.C., on behalf of the co-respondent Watson, moved the Court to order that the petitioner should also make Manning a co-respondent. A husband petitioning for dissolution of marriage is bound, by sect. 28 of 20 & 21 Vict. c. 85, to make every man with whom his wife is alleged in the petition to have committed adultery, a co-respondent, unless the Court on special grounds excuses him from so doing. The fact that Manning is resident at Natal is no ground for excusing the petitioner from making him a co-respondent. [THE JUDGE ORDINARY: What *locus standi* has a co-respondent to make such an application?] If Watson is proved guilty, the whole of the costs of the suit may fall upon him; whereas, if Manning were made a co-respondent and both were found guilty, Watson might be in a better position as to costs.

*Mr. Mundell*, contra: It is not necessary to make more than one alleged adulterer a co-respondent: *Hunter v. Hunter*, 28 L. J., 3 Prob. & Mat. Watson has no *locus standi* to make this application. So far from sustaining any injury by Manning not being made a co-respondent, he will be advantaged, for he can then call him as a witness: *Codrington v. Codrington and Anderson*, 3 Sw. & Tr. 368. On the other hand, the petitioner may be injured. The only proof of adultery with Manning may be admissions of the respondent, which, although evidence against her, would not be evidence against him, and the petitioner, if Manning is cited and defends himself, may, for want of evidence against him, be condemned in his costs. At all events, Watson should have filed an affidavit that he is innocent of the charge, and that the application is not made for delay.

1865. THE JUDGE ORDINARY: I certainly was at one time under  
 January 10, 24, the impression, from *Hunter v. Hunter*, that Sir C. Cresswell  
 and 31. was of opinion that it was not necessary that there should be  
 CARRER v. more than one co-respondent, although the petition charged  
 CARRER AND the wife with adultery with more than one man. I think,  
 WATSON. however, that the petitioner ought to make all the alleged  
 adulterers co-respondents, unless there are special grounds for  
 excusing him from so doing.

*Mr. Mundell* asked that the motion might stand over in order that affidavits might be filed by the petitioner showing special grounds for excusing him from making Manning a co-respondent.

*And leave was given accordingly.*

January 24. *Mr. Mundell* moved the Court to excuse the petitioner from making Manning a co-respondent. Watson has no right to oppose the application. In *Hook v. Hook*, 1 Sw. & Tr. 183, Sir C. Cresswell expressed a doubt whether the wife had a right to object to such an application; *à fortiori* a co-respondent has no such right. The petitioner has filed an affidavit from which it appears that, in October, 1864, he intercepted certain letters and found diaries in the handwriting of the respondent for the years 1856, 1857, 1858, and 1859, detailing acts of adultery with a person sometimes in the diaries described as C. M., and sometimes as K., which persons, from internal evidence, it might be inferred were the same person, viz. Charles Manning, and that there was great risk of procuring any evidence which would be admissible against Manning. If he should be cited and appear, the petitioner may be unable to make out a case against him, and may have to pay the costs of his defence. He is willing at the trial, with respect to the charge of adultery with Manning, to rest his case upon the diaries and letters.

*The Queen's Advocate* and *Mr. A. S. Hill* contra, contended

that the affidavits showed no ground why Manning should not be made a co-respondent.

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THE JUDGE ORDINARY: It certainly is a great hardship cast upon the petitioner, that if he has unquestionable evidence of adultery against his wife he must, by the terms of the Act, make the adulterer a co-respondent, for he may be placed in this position, that he may have evidence against his wife, but none whatever against the co-respondent. In such a case, if a man were made a co-respondent, and at the trial it should turn out that there was no evidence against him, he might be dismissed from the suit. Apply that to this case. If it may be taken as a datum that there is evidence against the wife, and none against Manning, if he were made a co-respondent, and the case were tried, he would be in a position to ask to be dismissed from the suit with costs. That would be a very inconsistent state of things. I am, however, clear that if the petitioner chooses to charge Manning with adultery, he is bound, unless by leave of the Court, to make him a co-respondent. The question is, whether a case has been made out to-day to dispense with that necessity in the exercise of the discretion of the Court. As to the special grounds, I should like the intercepted letters and the diaries to be brought into the Registry, that I may see them before deciding the question.

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v.CARRYER AND  
WATSON.*Cur. adv. vult.*

THE JUDGE ORDINARY NOW said :—This was an application on the part of a co-respondent that Manning, another person against whom adultery was alleged in the petition, should also be made a co-respondent. It was urged that under the 20 & 21 Vict. c. 85, s. 28, it is not necessary to make more than one co-respondent. But the Court is of opinion that whenever adultery was alleged in a petition against any man, that man must be made a co-respondent. The application then took another form. The same section which im-

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WATSON.

poses the necessity of making the alleged adulterer a co-respondent gives the Court a discretion to dispense with that necessity, and it was urged that this was a proper case for the exercise of that discretion. The ground on which it was placed was, that Manning is now resident at Natal, and that the bulk of the evidence as to the adultery charged to have been committed with him is contained in the wife's journals, and in letters in her possession, which would not be evidence against him; and the argument went so far as to insist, that though there was evidence against the wife with regard to Manning, there was none upon which a jury could find a verdict against him. If that had been clearly made out, I am not disposed to say that the Court would not have relieved the petitioner from making him a co-respondent. On the other hand, I do not intend at once to decide that the Court would so act. It is rather difficult to ascertain with certainty what was the motive of the Legislature in requiring that the alleged adulterer should be made a co-respondent. There may have been several motives. First, it may have been intended that any man against whom adultery is charged should have a citation served on him, in order that he may, if he like, appear and defend his character. In that view of the case, this enactment would be intended for his benefit. Another motive may have been, that it would be desirable, on behalf of the public, who are interested in not having divorces lightly granted, that there should be a party to the suit who should be interested in disproving the charge of adultery quite independently of the petitioner's interest in the matter, and his right to get costs; so that the mere fact of want of evidence against the alleged adulterer might not in all cases be a sufficient reason for dispensing with a co-respondent. In this case, I am by no means satisfied that the petitioner could not get evidence against Manning; I therefore reject the application to relieve him from the necessity of making the alleged adulterer a co-respondent.

## LING v. LING AND CROKER.

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*Dissolution of Marriage.—Death of Petitioner.—Marriage Settlements.—22 & 23 Vict. c. 61.*

LING  
v.  
LING AND  
CROKER.

The Court will make an order varying the trusts of a marriage-settlement on the petition of the guardian of the children of the marriage after the death of the petitioner.

This was originally the husband's suit for dissolution, and on the 16th of June, 1858, a decree of dissolution of marriage on the ground of the respondent's adultery was pronounced. The petitioner, Captain Ling, who never remarried, died on the 28th of February, 1860, leaving two daughters of the ages of seven and five years respectively. By his will, which was proved in the Court of Probate on the 11th of May, 1860, he bequeathed the whole of his property to his said daughters; but, if neither of them should attain the age of twenty-one, or be married under that age, he bequeathed the same to James Bremridge, whom he appointed executor and guardian of his children.

Mrs. Ling, after the marriage had been dissolved, went to New Zealand with the co-respondent, and had since remarried there.

The case now came before the Court on a petition by the said James Bremridge for an order, under sect. 5 of the 22 & 23 Vict. c. 61, as to the application of certain settled property.

The petition, in addition to the facts above stated, alleged, that prior to the marriage, which took place at Calcutta in 1849, Captain Ling gave a bond to Sir J. H. Littler, the father of the respondent, and A. C. Bidwell, conditioned for the payment to them, as trustees of his marriage settlement, of 25,000 Company's Rupees (equivalent to about £2500) when and so soon as he should be in a condition to pay that amount, and that he also executed an indenture of settlement, by which

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it was provided, that the said trustees should hold the said bond and the proceeds thereof, when paid off, in trust to invest the same in certain specified securities, and on further trust to permit the said Captain Ling to receive the annual income thereof during his life; and if the respondent should survive him, in trust to permit her to receive the same during her life, for the benefit of herself and the issue of the marriage; and after the death of the survivor, as to the principal, income, and accumulated proceeds thereof, in trust to pay and assign the same between and amongst all the children of the marriage, in equal shares, the portions of daughters to be paid at the age of twenty-one years, or on marriage; or, if they had attained twenty-one or married before the decease of the surviving parent, then at the end of six months after such decease. . . . If there should be no child of the marriage, or if the children of the said marriage should all die before they acquired vested interests, the trustees were directed to pay and transfer the trust-funds absolutely to the survivor of the petitioner and respondent; that Sir J. H. Littler died on the 18th of February, 1856, and the said A. C. Bidwell is now the surviving trustee; that the amount secured by the bond was never paid during his life by Captain Ling; that after his death the surviving trustee filed a bill in Chancery for the administration of his estate, and established in that suit a claim for £2671. 19s. 8d. for principal and interest due on the bond; that the petitioner Bremridge, as executor, collected the estate of Captain Ling, and in pursuance of a decree of the Court of Chancery, in part discharge of the said claim of the trustee, transferred to him £1189. 15s. Reduced Three per Cent. Annuities, and paid to him in cash £92. 17s. 10d., being the whole of the assets which had come to the hands of the executor, after paying testamentary expenses and the costs of the administration suit; that no other assets were outstanding.

Leave had been given to serve this petition on the solicitor

who had acted in the suit on behalf of Mrs. Ling, the sufficiency of such service being reserved.

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January 24.

LING  
v.  
LING AND  
CROKER.

*Mr. H. Matthews* now, in accordance with the prayer of the petition, moved the Court to order:—1. That A. C. Bidwell, or other the trustee or trustees of the settlement for the time being, do stand possessed of the trust-funds, subject to such of the trusts, provisos, and with such of the powers contained in the settlement as would be subsisting and operative and capable of execution if Mrs. Ling had died on the 16th of June, 1858 (the date of the decree), and with and subject to no other powers, trusts, or provisos. 2. That A. C. Bidwell, or other the trustee, etc., do pay to the petitioner, as guardian of the children, the interest, dividends, or other annual income arising from the prospective shares or share of the said children, or either of them, in any trust-funds under the said trusts, towards the maintenance and education of the said children, so long as they, or either of them, should remain unmarried and under the age of twenty-one years; and that he do pay to the petitioner, as executor of the said J. T. Ling, the said trust-funds in the event of both of the said children dying unmarried before attaining the age of twenty-one years.

*Dr. Spinks*, for A. C. Bidwell, the surviving trustee, consented to the order being made. The only question is whether the Court, under the 22 & 23 Vict. c. 61, has power to make the order after the death of the petitioner. In *Grant v. Grant*, 2 Swab. & Trist. 522; where the husband died after he had obtained a decree *nisi*, Sir C. Cresswell refused, on the motion of his executor, to make the decree absolute, in order that an application might be made under the above section on behalf of the children; the ground of that decision being, that the suit having abated by the petitioner's death, the Court had no power to make the decree absolute. Here, however, a final de-

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creed was pronounced in the lifetime of Captain Ling, and there seems to be no reason why the order should not be made.

*Dr. Wambey*, for Mrs. Ling, consented to the order being made.

THE JUDGE ORDINARY: I think, that under the 5th section of the 22 & 23 Vict. c. 61, the Court has power to alter the settlement for the benefit of the children, although the petitioner is dead. By that section the Court, after a final decree of dissolution of marriage, is empowered "to make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit." There is nothing in the section to show that the application can only be made by a parent. As the order prayed will be for the benefit of the children, and it is in accordance with the practice of the Court, it may be made.

*Dr. Spinks*, for A. C. Bidwell, asked that he might be allowed to discharge himself of the trust by transferring the trust-fund to the Court of Chancery. If the Court make the order upon him, the Court of Chancery will decline to interfere.

THE JUDGE ORDINARY: I may make an order extinguishing the trust in favour of Mrs. Ling. The trustee will then only be liable for the performance of the other trusts.

Application was then made on behalf of all parties for costs.

THE JUDGE ORDINARY: I think that the guardian is entitled to his costs of the application. I think Mrs. Ling is not entitled to costs. As to the costs of Mr. Bidwell, I shall



make no order; if he is entitled to them, I think that he will get them from the Court of Chancery.

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KNIGHT *v.* KNIGHT.*Cruelty.*

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—  
KNIGHT  
*v.*  
KNIGHT.

Cruelty established by proof of habitually insulting conduct and violent temper, connected with an adulterous intercourse carried on by the husband, and leading to frequent quarrels, and occasionally to slight acts of violence, and causing mental and bodily suffering.

This was the wife's petition on the ground of adultery coupled with cruelty. The respondent did not appear.

The cause was heard before the Judge Ordinary, without a jury, on the 14th of June.

*Dr. Spinks* and *Mr. Pearce* for the petitioner.

The marriage was in September, 1851, and the parties cohabited from that time until the beginning of 1865, at the house of the petitioner, York Gate, Regent's Park. In 1863 the respondent made the acquaintance of a girl named Margaret Phillips, who was employed in a shop in Regent Street, and from that time until the separation he carried on an adulterous intercourse with her. After he had formed this connection he treated his wife with unkindness; he boasted to her of his connection with Phillips. On one occasion he introduced Phillips to her, and wished that she should be invited to his house. They had frequent quarrels, all on the subject of his intimacy with Phillips; and in the course of some of them the petitioner said that the respondent had pushed her about and bruised her. On one of these altercations the petitioner broke a blood-vessel.

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v.

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*Dr. Spinks* : The question is, whether the cohabitation can be renewed with safety to the petitioner. The respondent has insulted her by repeatedly boasting of his adultery, and has refused to give up his paramour ; and it is evident that he is a man of very violent temper, and if she returns to cohabitation and the quarrels are renewed, there is reason to apprehend danger from his violence.

*Cur. adv. vult.*

THE JUDGE ORDINARY : It was proved beyond doubt that respondent had for more than a year before this suit maintained an adulterous intercourse with a young girl, for whom he had suffered himself to indulge a passionate attachment. For some time, by his unaccountable conduct, he tortured his wife by incessant suspicion of his fidelity. The outbreaks between them springing from this fertile source were frequent, and marked on his part with unrestrained violence of language and demeanour. On one occasion she broke a blood-vessel in the excitement thus caused. On another occasion he introduced his paramour to her, and tried to obtain a place for her at his table. Finally, on more than one occasion he laid violent hands on his wife and inflicted bruises and injuries, which were afterwards visible on her person. The amount of mental and bodily suffering thus induced, the lengthened period over which it lasted, the bold and open manner in which he finally avowed to his wife his passion for another woman, and his determination to indulge it, combined to give these acts of violence a still less excusable character. And the case is, I think, made out as one of adultery coupled with cruelty.

*Decree nisi, with costs.*

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DENT *v.* DENT.

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DENT  
*v.*  
DENT.

*Dissolution of Marriage.—Revival of Condoned Adultery by  
 Subsequent Cruelty.*

The word "condonation" has the same meaning in the Divorce Acts that it had in the Ecclesiastical Courts. Condoned adultery, therefore, may be so revived by subsequent cruelty as to found a sentence of dissolution.

The Court will, at the prayer of the petitioner, at the hearing make a decree of judicial separation instead of a decree *nisi* for dissolution, although the petition prays for dissolution, and facts are proved on which the dissolution might have been granted.

This was the wife's petition for a dissolution of marriage, on the ground of adultery coupled with cruelty. The respondent in his answer, traversed those charges, and pleaded condonation as to the adultery. Issue was joined on these pleas, and the cause came on for trial before the Judge Ordinary by a common jury.

*The Queen's Advocate* and *Mr. Pritchard* for the petitioner.

*Mr. G. Browne* for the respondent.

It was proved that the marriage took place on the 26th of June, 1850; that the parties afterwards cohabited at various places in the West of England, and latterly at Weston-super-Mare until September, 1864; that they had several children, the last of whom was born in July, 1863; that the respondent had committed an act of adultery in 1861, which was condoned by the petitioner; and that he had committed divers acts of cruelty, the date of the last act being immediately before the separation.

THE JUDGE ORDINARY, in summing up, gave the following

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direction to the jury on the issue of condonation: It is said on the part of the husband, that the adultery committed by him was condoned or pardoned by the wife. It is very properly admitted by the Queen's Advocate that the adultery of the husband was condoned by the wife; and you will have no difficulty in finding that issue for the respondent. But then it is said, that although that adultery was condoned, the condonation was done away with by the subsequent misconduct of the husband. Now the rule of law is, that all condonation is conditional, and the condition is, in future you shall treat me as a husband ought to treat his wife; and if you hereafter break your matrimonial obligation, and are guilty of adultery or of cruelty, the condoned offence is revived. The question for you is, whether there was any subsequent cruelty by the respondent which did away with that pardoning or condonation. The pardoning having taken place in 1861, there is evidence that in 1864 the husband was guilty of cruelty. If you are satisfied of that fact, you will find that, although the wife did pardon the husband's adultery, there was subsequent cruelty committed by the husband which revived that adultery.

The jury found that the respondent had been guilty of adultery and cruelty; that the adultery had been condoned; and that he had been guilty of cruelty subsequent to that condonation.

*Mr. G. Browne:* The Court is bound, by the 30th section of the 20 & 21 Vict. c. 85, to dismiss the petition. The meaning of the statute is, that a marriage shall not be dissolved for any cause but adultery; and although condoned adultery may be revived by subsequent adultery, it cannot be revived for the purpose of founding a claim for dissolution by subsequent cruelty. The words of the statute are distinct, and if the adultery complained of has been condoned the petition must be dismissed. He cited *Goode v. Goode and Hamson*, 2 Sw. & Tr. 253. It is admitted that the doctrine

of revival is established by the cases in the Ecclesiastical Courts; but those cases are not applicable to suits for dissolution under the statute.

*The Queen's Advocate*: The meaning of condonation is conditional forgiveness (*Eldred v. Eldred*, 2 Curt. 385), and the same meaning is to be given to it in construing the statute as that which was given to it by the judges of the Ecclesiastical Courts: *Goode v. Goode and Hamson*. The condition upon which the husband's adultery was condoned having been broken, the effect of the condonation is taken away. If the Legislature had intended to use the word "condonation" in any other than the legal sense, if it had intended its meaning to be absolute forgiveness instead of conditional forgiveness, it would have expressed that intention. The doctrine of revival is as applicable to suits for dissolution as it was to suits for divorce *à mensâ et thoro*.

THE JUDGE ORDINARY: I am of opinion that the point which Mr. Browne has taken very clearly and ingeniously cannot avail him. He asks me to take the words of the statute as they stand, disregarding the meaning which I should think must be put upon them by any one who reads them, and to hold that when the adultery complained of has once been condoned, although it has been revived according to the ecclesiastical law by subsequent cruelty, the Court is bound to dismiss the petition. "Condonation" is a strictly technical word. It had its origin, and as far as I know its entire use, in the Ecclesiastical Courts, and it means "forgiveness with a condition." The statute says, that if the petitioner has condoned, that is, has conditionally forgiven, the adultery complained of, the petition shall be dismissed. The question is, whether the Legislature meant by those words that where the petitioner has conditionally forgiven the adultery complained of, her remedy should be barred, although

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DENT.

the condition of the forgiveness is afterwards broken. Such a construction seems unreasonable. It seems to me that if the condition on which the forgiveness is founded is broken, the effect of the forgiveness is taken away as if there had been no condonation at all. I think the statute means, not that the petitioner shall be barred of her remedy if she has ever condoned, but that she shall be barred of her remedy if the condonation is still existing. If the statute is to be read in a way that will make sense of it, that must be its meaning. To read it otherwise one must suppose that the Legislature intended to give to the word "condonation" a meaning different to that given to it by the ecclesiastical law, which they were in part re-enacting, and one which would lead to great injustice. The petitioner is entitled to a decree *nisi*.

*The Queen's Advocate*: The petitioner instructs me to pray for a decree of judicial separation instead of a decree *nisi*.

*Mr. G. Browne*: The adultery and cruelty having been proved, the Court is bound to pronounce a decree of dissolution.

THE JUDGE ORDINARY: The Court always prefers to grant a decree of judicial separation rather than a decree of dissolution, and it certainly will not dissolve a marriage against the wish of the petitioner. *Judicial separation decreed.*

March 1.

CHETWYND  
v.  
CHETWYND.

CHETWYND v. CHETWYND.

*Order for Payment of Wife's Costs of Hearing.—Bill of Exceptions pending.*

After a wife has obtained a verdict, and a decree *nisi* has been pronounced, an order was made for the payment by the husband of her

surplus costs of the hearing beyond the sum deposited in the Registry, although a motion for a new trial and a bill of exceptions were pending.

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The issues in this suit by a wife for dissolution were tried before the Judge Ordinary by a special jury on the 20th of January 1865, and a verdict was pronounced for the petitioner, and a decree *nisi* pronounced.

On the 21st of February the Judge Ordinary made an order in chambers, for the payment by the respondent of the taxed costs of the petitioner, beyond the amount, £500, for which security had been given in the Registry before the hearing.

*Mr. Bush Cooper* moved for a rule to set aside the order made in chambers for the payment of surplus costs. The order is premature, as the surplus costs are dependent on the event of the suit (*Sopwith v. Sopwith*, 1 Sw. & Tr. 484); and although the verdict has been delivered and a decree *nisi* has been pronounced, notice has been given of a motion for a rule for a new trial, and there is also a bill of exceptions pending. If the respondent succeeds in setting aside the verdict, the surplus costs will not be payable. As long as the verdict is impeachable the order for surplus costs ought not to be made.

*The Queen's Advocate, contra.*

THE JUDGE ORDINARY: I will postpone my judgment until the motion for a new trial has been made.

On the same day the motion for a rule *nisi* for a new trial was made and rejected.

*Mr. Bush Cooper* renewed his motion, and cited *Kaye v. Kaye*, 27 L. J. Rep. P. & M. 45; and *Dixon v. Dixon*, 28 L. J. Rep. P. & M. 96, to show that the costs followed the

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event, and that, when the petitioning wife was successful, it was unnecessary to make any order as to costs.

THE JUDGE ORDINARY: Those authorities are at variance with the daily practice of the Court. The 51st section enacts that "the Court, on the hearing of any suit, proceeding, or "petition under this Act, may make such order as to costs "as to such Court may seem just," and the ordinary course in making a decree in a suit by a wife is to go on to order that the respondent be condemned in costs.

*Mr. Bush Cooper*: The costs ought not to be paid until the bill of exceptions is decided.

THE JUDGE ORDINARY: I am of opinion that this application to vary the order as to costs must be refused. After the trial the Court made a decree *nisi*, and under the powers given to it by the 51st section condemned the respondent in the costs incurred and to be incurred by the petitioner, and directed them to be taxed. That decree was made on the 20th January, the day on which the verdict was delivered. Accordingly, under that order the costs were taxed, and on the 21st February the parties came before me, and I made an order that they should be paid by the respondent. It seems to me that the pendency of the bill of exceptions is no answer to that application. I therefore refuse to rescind the order, and I reject this motion with costs.

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CLARK *v.* CLARK, PERRIN, AND CUMINS.

1865.

March 18 &amp; 21.

*Husband's Petition.—Wife's Answer.—Unfounded Charge.—*  
*Costs.*

CLARK  
*v.*CLARK,  
PERRIN, AND  
CUMINS.

Where the wife's answer contains charges against the husband which at the trial appeared to have been made without any foundation, the whole of her costs will not be allowed to be taxed as against her husband.

This was the husband's petition for dissolution of marriage by reason of the wife's adultery. She had answered, traversing the adultery, pleading condonation, connivance, and acts of cruelty from shortly after the marriage, at some length. She also counter-charged adultery.

The issues were tried before the Judge Ordinary, by a common jury, on the 18th of March.

*Dr. Spinks* and *Mr. Searle* for the petitioner.

*Dr. Wambey* and *Mr. Pritchard* for the respondent.

*Mr. Inderwick* for Perrin.

*Mr. W. A. Holdsworth* for Cumins.

The wife's adultery was clearly proved with Perrin. No evidence in support of her answer had been adduced. The husband had paid into the registry or given security for £75 to meet the wife's expenses of the trial.

*Cur. adv. vult, as to costs.*

THE JUDGE ORDINARY: On the trial of this case I reserved the question of costs. A most improper, because entirely unfounded, defence had been set up by the wife, and detailed acts of cruelty set out in her answer, which she had

March 21.

1865. no evidence whatever to support. The practice which obtains  
March 18 & 21. in this Court, of making the husband pay the costs of the  
CLARK wife whether she succeeds in the suit or not, can only be  
v. justified by the supposed necessity of the thing. I say sup-  
CLARK, posed, for I am by no means assured that the necessity is not  
PERRIN, AND rather theoretical than practical. But at any rate there can  
CUMINS. be no need for setting to the cost of the husband fictitious  
charges against him, and thus laying his purse at the mercy  
of his wife or her advisers. The amount thus heaped upon  
him makes his suit always costly and often impracticable.  
The wife in this suit has, by means of a fictitious defence,  
forced the petitioner to pay into court or secure £75 to  
defray her expenses, though she had been living in flagrant  
adultery, and had not a single witness on the trial on her own  
behalf. An efficient stop must be put to this practice, and  
the Court therefore pronounces the following order as to costs.  
The wife's costs must be taxed as if she had only traversed  
the adultery and gone to trial upon that issue alone; all  
costs of and occasioned by the rest of her answer being dis-  
allowed. From the costs thus taxed must be deducted any  
costs which the registrar shall find that the petitioner has  
reasonably incurred, in witnesses or otherwise, for the purpose  
of meeting the charges made against him in the answer; and  
the residue, if any, is to be paid to the respondent out of the  
£75. With respect to the case against the co-respondent  
Perrin, the Court condemns him in the costs of that case, and  
this will include, as usual, the costs which the petitioner has  
had to pay to the respondent in respect of that charge. With  
respect to the case against the co-respondent Cumins, he and  
the petitioner will each bear his own costs.

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July 19.

SCOTT v. SCOTT.

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v.

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*Restitution of Conjugal Rights.—Nature of Defence.*

Unless the respondent to a petition for restitution of conjugal rights can establish a legal defence to the petition, the petitioner will be entitled to a decree, and the Court has no discretion to inquire into the sincerity of the petitioner in bringing the suit.

This was the husband's petition for restitution of conjugal rights.

The respondent had filed an answer, charging the petitioner with cruelty. The issue joined on this plea was tried before the late Judge Ordinary, by a special jury, who found a verdict for the petitioner.

An application for a rule *nisi* for a new trial was made to the Judge Ordinary, who refused a rule, and upon appeal to the full Court, this refusal was confirmed. A subsequent motion for a decree had been rejected, on the ground that the marriage had not been formally proved.

Affidavits having been filed proving the marriage of the parties,

*Mr. Karlake, Q.C.*, (*Mr. Shaw* with him) now moved for a decree.

*The Queen's Advocate* (Sir R. J. Phillimore), on behalf of the respondent, asked the Court not to pronounce a decree. Although the respondent failed to establish the charge of cruelty, it appeared from the evidence that the real object of the petitioner in instituting the suit was not to obtain the society of his wife, but to obtain the custody of her person, and thereby to extort money from her and her mother. He referred to *Burroughs v. Burroughs*, 2 Swab. & Trist. 303.

*Dr. Spinks* on the same side:—It may be a question whe-

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ther, in suits for restitution, the Divorce Act having introduced a new matrimonial offence, viz. wilful separation without reasonable excuse, the old law is not thereby altered, for it has been held that there may be a reasonable cause of separation other than the causes which would formerly have been an answer to a suit of restitution. In this case, although the respondent failed to establish cruelty, and therefore was not entitled to a judicial separation, she did establish that there was cause for the separation. I admit that a plea framed upon that theory has been struck out on the ground that nothing can be pleaded in bar to a suit for restitution of conjugal rights, which would not be ground for a divorce *à mensâ et thoro*. [THE JUDGE ORDINARY:—Assuming the allegation of cruelty to be untrue, what reasonable excuse had Mrs. Scott for refusing to return to her husband?] The whole circumstances of the married life as they appeared in evidence. The petitioner's object was to get money from his wife and her mother, not to obtain his wife's society.

*Mr. Karslake* in reply:—The respondent only pleaded cruelty in bar. Having failed to establish that defence, she now makes a sort of equitable appeal to the discretion of the Court. There is no authority for the refusal of a decree upon any such ground. The defence she relied on having failed, she is bound to return to cohabitation.

THE JUDGE ORDINARY:—I think I am bound to make the decree. No precedent for refusing it has been cited, and it would be very inconvenient if, after the respondent has, by her answer, raised an issue which has been found against her, the duty should be cast upon the Court of sifting the evidence for the purpose of ascertaining whether there is sufficient ground for refusing a decree. There is a broader ground upon which I found my decision. If the Court were to refuse to order the respondent to return to cohabitation, it ought,

according to the principles on which the Ecclesiastical Courts acted to grant her a decree of judicial separation, and yet it is not contended that the petitioner in this has been guilty of any matrimonial offence which would be ground for a judicial separation. It may be that, as desertion is now a ground for judicial separation, it would also be an answer to a suit for restitution. The law has hitherto enforced the obligation of conjugal cohabitation on man and wife, unless one of them has been guilty of some definite offence known to the ecclesiastical law, such as cruelty or adultery. If I refuse this decree, I should throw the whole matter into doubt and difficulty, for no precise definition has been offered to the Court of a matrimonial offence which would be an answer to this suit. I therefore make a decree in the ordinary form.

*Decree granted.*

(Before THE JUDGE ORDINARY, in Chambers.)

L— (falsely called H—) v. H—.

*Woman's Petition for Nullity.—Inspector's Report.—Conflicting Evidence.*

Feb. 10 and 11  
and March 21.

L—  
(falsely called  
H—)  
v.  
H—.

The woman cohabited with her husband from their marriage, in November, 1848, till July, 1862; she then occupied a separate bed for two or three weeks, and left his house in August, 1862, after disputes about other matters, and did not return to it. In May, 1864, she filed her petition for nullity, by reason of his impotence; he traversed this, and alleged consummation. The report of the inspectors pronounced her to be a virgin and apt, and stated that the man had no apparent imperfection. At the hearing the petitioner and respondent both gave evidence, and medical men, besides the inspectors, gave evidence on both sides. In the result the Court

**HELD**, that the petitioner had failed to prove that the marriage had remained unconsummated by reason of the impotence of the man, and dismissed him from the suit.

1865. This was a petition for a decree of nullity of marriage, brought by the woman.  
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—  
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 (falsely called  
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The petition, filed on the 7th of May, 1864, alleged a ceremony of marriage on the 7th of November, 1848, the man being then about thirty years of age, and the woman about twenty-two years. That at the time of the said marriage the said H., by reason of the frigidity or impotence of his parts of generation, was, and has ever since continued, unable, to consummate the marriage by carnal copulation, notwithstanding that the said petitioner cohabited and constantly occupied the same bed with the said H. until the month of July, 1862, and resided with him in the same house till the 19th of August following, and the said petitioner was apt and willing to receive his conjugal embraces. That such frigidity and impotence of the said H. is incurable by art or skill.

The respondent's answer denied that at the time of the marriage, or at any time since, he had been from any cause unable to consummate the said marriage, and alleged that it had, in fact, been consummated by carnal copulation. Issue taken and joined by replication.

The report of the medical inspectors, Dr. Farre and Dr. Sewell, was in the following terms:—

“19th July, 1864.

“We, the undersigned, testify that we have this day examined the parts and organs of generation of L., otherwise “H., and we find that she is a virgin, that there is a “hymen, and that there is no impediment on her part to “prevent the consummation of marriage.”

“19th July, 1864.

“We, the undersigned, testify that we have this day examined the parts and organs of generation of H., and we “find that there is no malformation, nor any appearance “indicating a want of capacity of performing the act of generation.”

The case was heard by the Judge Ordinary in chambers (on consent of both parties), on the 10th and 11th of February. 1865.  
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*The Queen's Advocate* (Sir R. J. Phillimore), *Dr. Spinks*, and *Mr. Searle* for the petitioner.

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*Dr. Deane*, *Mr. Serjeant Ballantine*, and *Dr. Swabey* for the respondent.

*The Queen's Advocate* opened the petitioner's case.

The substance of the oral evidence given by the witnesses called on either side was as follows :—

Mr. Soden, on behalf of the petitioner :—

"I practise as a surgeon. I first knew Mrs. L., petitioner's mother, in March, 1864. Mrs. L. and the petitioner called on me; at their request I examined the petitioner, the result of which was, that I had no difficulty in concluding that it was a case of perfect virginity. I asked certain questions of the petitioner, and received answers. I saw her once again and examined her more fully than the first time. I remained of the same opinion. From my medical experience I think it would be injurious to the petitioner if she returned to cohabitation."

On cross-examination :—

"The signs from which I came to the above conclusion were the extreme smallness of the orifice of the vagina, so small that it would not admit my little finger without constriction; a well-defined hymen; prominent well-defined rugæ of membrane lining the vagina; a total absence of all posterior dilation, which must be present where ordinary intercourse has frequently taken place. By posterior I mean the back portion of the orifice. By hymen I mean a fold of membrane half closing a natural orifice; it varies very much in form, sometimes circular with a hole in centre; it is more generally

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semilunar. In some instances it is hard and difficult of rupture; occasionally it is very much relaxed. The rugæ are consistent with a certain amount of intercourse. They would only be totally obliterated by childbirth. Their marked prominence is a matter of importance after many years of married life. In some cases, of what I suppose you refer to as relaxed hymen, a foreign body might pass beyond it without rupturing it, but only where there is an unusual dilation of the vagina above it. Application of astringents would not, I think, reduce such dilation. I do not recognize any such state of relaxation except as a natural formation of the parts. To some extent the condition of contraction and relaxation of the muscle round the orifice would vary according to the nervous condition of the parts; it is a sphincter muscle. In the present instance I should imagine pregnancy could not have occurred."

On re-examination:—

"I saw none of these peculiar conditions in the petitioner's case. On the contrary, as I have stated before, the orifice was very small. Excessive menstruation is not uncommon soon after marriage. It is sometimes doubtful whether a case is one of excessive menstruation or of miscarriage."

Dr. Farre, on behalf of the petitioner, confirmed the inspector's report as above given. On cross-examination:—

"In such cases I judge a good deal by the hymen. It consists of the last fold of the membrane that lines the passage to the womb. The aperture is generally circular. The semilunar form is not so common. The membrane is very rarely indeed so small as to be scarcely perceptible. What takes place in connection is more generally a wearing out or obliteration than actual rupture. The discharge of blood in connection depends on the general state of those parts, not of the hymen in particular. There are cases of hymen continuing after penetration, where the parts of the man are small. I have attended a woman in labour where the hymen was not



ruptured. As to whether a miscarriage has occurred to the present petitioner, that must depend on the question of impregnation without penetration beyond the hymen. At all events it must have been in a very early stage of pregnancy. Astringent injections do act on the vagina. The parts of a young woman (I mean a woman not past menstruation) who has ceased to cohabit do commonly become smaller."

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On re-examination :—

"The hymen may not be fully dilated, and in such a case it might be restored; but after complete dilation I have never known it entirely restored. Impregnation may take place without penetration of the parts within the hymen. Menstruation is commonly, soon after marriage, mistaken for miscarriage."

Dr. Sewell, on behalf of the petitioner, confirmed his report as above given, but was not cross-examined.

Mrs. L., mother of the petitioner, on behalf of the petitioner: Her evidence did not give any other facts than those spoken to by the petitioner herself afterwards; but on questions being put in cross-examination as to the circumstances of the family before the petitioner left the respondent's house in 1862.

*The Queen's Advocate* objected to such an inquiry as irrelevant to the only issue in the case.

THE JUDGE ORDINARY: Though the consummation or non-consummation of the marriage, owing to certain causes, may be the only issue, yet in the course of the investigation it is impossible to exclude anything that tends to throw a light on the credibility of the whole case set up. Now the motives of the parties may throw great light upon that. Take an extreme case: suppose it to be alleged on the other side that the whole of this proceeding was for a collateral purpose, and that evidence were tendered of a conversation between the

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petitioner and some other person which went to show that she wished to separate from her husband on some ground wholly distinct from that which forms the subject of the suit, surely that would throw light on the question. The weight of such evidence is another matter; but I am clear that it is admissible, and if I have reason to think that you are taken by surprise I will adjourn the case.

Mrs. L.'s cross-examination was then resumed.

Petitioner produced on her own behalf:—

I lived with the respondent from our marriage in 1848 till August 1862. On the first night we slept together attempts at connection were made. I have been told what consummation means; there was no consummation that night. Attempts were still continued; his person partially entered my person. I am sure there was no erection of his person, nor penetration of mine. I never complained to any one; how could I tell? My father did not like my marriage. I had not the least idea at the time of marriage what takes place between man and wife. I thought things were very strange; I can scarcely say I had doubts. The respondent always made excuses of some kind; he very often spoke of a kick he had had, that was when these attempts were made; sometimes said he was fatigued, or worried, or not well. I hardly knew whether this referred to present weakness or to the fact of my having no children. I went to my mother in the autumn of 1862. I first knew from her that I had not been treated as women are by their husbands. My mother was talking of the respondent's unkindness and keeping things back from me which I wanted; she said some people said I might go back and live with him. I said he had never really loved me. She asked what I meant? I said I thought he had never cared for me as men do care for their wives. She pressed me to tell her more. I said I believed it must have been because of the kick which he so often spoke of. After he sent me

away my mind dwelt much upon the manner in which he had treated me. I saw a short account of Miss Balfe's case in the 'Standard;' I had spoken to my mother before that time; I spoke to her afterwards; I brooded over it and could not rest. I saw Mr. Soden; he asked me a great many questions. I had been thinking of bringing this suit before, but had not made up my mind till I saw Mr. Soden.

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On cross-examination: There was never at any time marks of blood on bed linen or clothes after these attempts. I was hurt by the attempts; they were always painful. I suffered next day. Impossible for me to explain what caused the pain; I should say the pain was external; I think never internal; it was caused by these long attempts, I suppose.

By the COURT: What do you mean by long?

A quarter of an hour or twenty minutes.

I cannot say what pressure caused the pain; the continued pressure of a soft substance caused the pain. Soon after marriage I consulted Dr. Everett; I had had a fall, my mother suspected a miscarriage; Dr. Everett treated me for that. After that I saw Dr. Black, occasionally, for several years. I do not remember that I stated to him that I had two if not three miscarriages. I do not recollect Dr. Black suggesting that I should sleep apart from my husband at any time; I consulted him for general weakness; I mentioned pain from the time of marriage in certain parts; on and off I consulted all the doctors as to that. I cannot swear that Dr. Black did not make some suggestions about separate beds. I did not mention to Dr. Black any doubts as to the marriage having been consummated. I saw Dr. Gream once at his own house. External applications and lotions were ordered from the first. Mr. Soden was the first person who examined me. Dr. Nicholls suggested an examination of my person to my mother, but not to me.

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The petitioner was then cross-examined at length as to the general terms on which she had lived with her husband, and as to the circumstances which had occurred in the spring and summer of 1862 before she left and her conduct since.

Various letters of hers were put in evidence, and the history of the parties, deduced from this part of the petitioner's cross-examination, and from her letters and other evidence in the case, may be shortly taken as follows:—

The respondent was a solicitor in a country town. Petitioner and respondent lived on the best terms as man and wife for years after their marriage. Her father and mother lived in the neighbourhood, and she was in the constant habit of seeing her mother. About 1860 the petitioner and respondent became intimate with a Dr. and Mrs. N— living near them. After a time the respondent objected to the petitioner keeping up the intimacy, in which she persisted. In the early part of 1862 the petitioner's father died, whereupon the income of certain moneys secured by her marriage settlement came into possession. A few weeks after the father's death a brother died intestate, and a share of his money came to the petitioner. The petitioner and respondent both wished to have spent this money, or part of it, but it turned out that there was a clause in the settlement securing after-acquired property. This led to some disputes, and the petitioner considered that her father's memory was unjustly attacked by the respondent. To use her own words on this point: "We occupied separate rooms for a few weeks before I left the house in August, because he spoke of my dear father in such a manner that I determined I would never be in the same room with him again. I made up my mind at that moment, two or three weeks before I left."

In August, 1862, there was a talk of the petitioner going to an uncle at Folkestone. The respondent wished to go with her; the petitioner objected, and determined to go, as far as London at least, with Dr. and Mrs. N—. The respondent

wrote a note forbidding her going with the N—s; but, according to the petitioner's view, afterwards gave a tacit consent. She went. The respondent denied that he had ever varied from the note he had written to her, and which was in evidence. He refused to receive her again without some explanation. Attempts continuing for many months were made by friends and relations to bring about a reconciliation. Letters of hers written during this period were put in evidence; they referred in various terms to the grounds of misunderstanding above hinted at, but contained no allusion to the complaint now brought forward.

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She said on cross-examination: "I have resisted all attempts at reconciliation."

*Dr. Deane* opened the respondent's case, and the Court adjourned.

The respondent, produced on his own behalf, gave his statement of the dispute about the settlement and the intimacy with the N—s, and proceeded as follows:—

The petitioner never charged me as unfit for the duties of a husband; at the time of marriage I had connection—penetrated her person. There was never any disability. It is not true that there was no erection, or that I was in the habit of lying upon her for fifteen or twenty minutes together. She told me she had had a miscarriage, a month or two after our marriage, in consequence of a fall. *Dr. Everett* attended her. I received a letter from *Dr. Black*; I told my wife what *Dr. Black* wished, that we should sleep together less frequently. I had an accident when I was seventeen, a kick in the testicles; I was ill for a day or two, and there was an end of it. I may have mentioned it to my wife; never gave it as an excuse for not having connection.

On cross-examination:—

To the best of my belief I had full and complete connection with my wife every year on many occasions.

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In answer to the Judge Ordinary :—

My wife was delicate when she married ; she always suffered from weakness. After she consulted N—, I was aware of her using a lotion ; I think she had done so when under Dr. Everett's treatment. I was not conscious of my wife being formed differently from other women. As to Dr. Black's letter, I talked to my wife about less sexual connection. I do not recollect what she said ; but nothing came of it.

Dr. Everett, on behalf of the respondent :—

I was called on to attend Mrs. H. soon after her marriage. I was told that she was suffering from miscarriage caused by a fall down some steps. I treated her accordingly. There were the usual signs of miscarriage—pain and discharge.

On cross-examination :—

Excessive menstruation may be mistaken for miscarriage ; but excessive menstruation would not be caused by slipping down stairs, and it would be likely to recur. Uterine inflammation would only be caused by mechanical violence acting on the womb ; ineffectual attempts at intercourse would not occasion it. It is possible or probable that sleeping in the same bed without connection—unsatisfied excitement—might cause uterine inflammation.

The following answers of the witness were given partly on re-examination and partly to further questions put by the Queen's Advocate and the Judge Ordinary :—

A full state of the vessels of the womb caused by unsatisfied excitement might be continuous. I was never consulted by the petitioner for congestion of the womb. The discharge I saw was sanguineous ; there were the symptoms of miscarriage. I have heard the petitioner's account of the attempts at intercourse by her husband ; they would not, I think, injure the womb. What I actually saw was not menstrual fluid. I did not see an ovum, which is the only infallible sign of miscarriage ; but unless all the discharges are kept it

might, especially at so early a period, escape notice. The petitioner afterwards consulted me for leucorrhœa. I probably ordered astringent lotions or injections. I do not think any astringent application would restore the condition of the hymen so that, on inspection, it might appear that connection had not taken place. I make the same answer, assuming that the hymen had not been ruptured, but only distended. I heard Dr. Farre's evidence. I think that the existence of a hymen does not indicate with certainty that no penetration had taken place. It is possible that the formation of the parts might admit of penetration without destroying the hymen. According to the evidence given yesterday, of the formation of Mrs. H.'s person, I should think the present is a case of imperfect penetration. I do not think any permanent contraction of the parts of the vagina, other than the hymen, could be effected by artificial means. I think it possible that, after full and perfect connection for fourteen years, the hymen might remain. I never met with such a case in my own practice.

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Dr. Black, produced on behalf of respondent:—

The first time the petitioner consulted me was in September, 1852. I have referred to my notes. She was suffering from neuralgic pain, and from general derangement of digestive and uterine organs. I saw her alone. I did not then know her husband. In giving the history of her case she told me that her health was rather better since than before marriage, and that she had had three miscarriages. I asked her as to habits of menstruation. It was scanty, and attended with pain. She also had leucorrhœa. Both these symptoms existed before marriage. I gathered from what she said, that she and her husband were much attached to each other, and had frequent intercourse. I saw her, off and on, from September, 1852, till May, 1859. I concluded more than ordinary sexual intercourse—partly from her, partly from her husband. On reflection, I do not think I formed that conclusion indepen-

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dently of what the husband said; certainly nothing from her to lead me to suppose that intercourse had not taken place. She seemed a person of intelligence and great reserve. I proposed an examination of her person, which she declined. I should think existence of hymen is consistent with perfect penetration. There might be a general relaxation of the surrounding parts.

On cross-examination:—

The hymen may be so relaxed that a foreign body may be introduced, and that part recover its position. The fact of impregnation shows perfect connection. I know of no recorded case where, after full and frequent intercourse for fourteen years, the hymen has been found intact.

On re-examination:—

From the petitioner's account of what took place in bed with her husband, impregnation would be impossible.

In answer to the Judge Ordinary:—

I never attended her for excessive menstrual discharge.

Dr. Gream, on behalf of the respondent:—

I have known cases of virginity, by which I mean non-rupture of the hymen, after marriage, from two or three different causes (I do not think that the hymen is always a test of virginity); a rigid hymen may be carried up into the vagina without rupturing or permanently dilating it. A man might suppose he had had perfect connection. Supposing such a state of facts early in matrimonial intercourse, the hymen would be more likely to relax and give way. There is a thin hymen which dilates with great facility; I have no doubt connection might take place with a man of perfect power without destroying such a hymen; the man's parts might pass beyond it. From the petitioner's evidence I should think that complete penetration had not taken place; but that, from obstruction in the female rather than from weakness in the man. No impregnation could take place without erection; at least without a semi-erection; but that



would not have caused pain. I should expect to find the parts of a man shrivelled where complete impotence exists at twenty-five years of age. I have not myself met with any case of impotence where the man's parts were apparently perfect, but such cases may exist. If a man were impotent for sixteen or seventeen years together, I should expect to find signs of it, but impotence may exist without.

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——  
L—  
(falsely called  
H—)  
v.  
H.

On cross-examination :—

I think that complete penetration could not take place without enlarging the posterior parts of the vagina.

In answer to the Judge Ordinary :—

I think that a husband might go on for years imagining he had had connection, and yet the wife have perfect hymen (I have known such a case after eight or nine years' cohabitation), so that neither man nor woman might be aware that the act of generation had not been perfectly performed. In the case of a large vagina and very relaxed hymen, intercourse might go on for years without rupturing the hymen. But in the case of such a person as the petitioner is described in the evidence, I do not think perfect penetration could take place. According to Mr. Soden's description, the vagina in the petitioner's case is unusually small.

*Mr. Serjt. Ballantine* summed up the respondent's case, and

The *Queen's Advocate* replied.

*Cur. adv. vult.*

The JUDGE ORDINARY gave the following judgment :—In all cases of this class there are two distinct questions. First, whether the marriage has in fact been consummated : and if not, then whether this has arisen from the impotency of the party charged. It devolves upon the petitioner to establish both these propositions to the reasonable satisfaction of the Court. The media of proof are threefold :—medical inspection of the parties ; medical testimony as to the conclusions to be

In March 21.

1865. drawn therefrom ; and finally, the examination upon oath of  
Feb. 10 and 11 both parties as witnesses. The Court has in this instance a  
and March 12. full body of evidence from all these sources, and is now pre-  
pared to state the result of it after a careful review. But in  
I— doing so I do not propose to myself, save so far as need be,  
(falsely called H—) to enter into details which are of so personal and delicate a  
v. nature that they may be fitly excluded from the pages of a  
H—. public judgment. I am satisfied, then, that this marriage  
has never been consummated in the complete sense of that  
term ; but I am by no means assured that there is any impo-  
tency on the part of the husband. I consider the actual state  
of things to be partly due to causes in which the petitioner has  
her share ; and I believe that both parties did in this case what  
Dr. Gream informed the Court he had known to happen in  
others, namely, live happily together for years under the im-  
pression that the marriage had been fully consummated, when  
in fact it had not. These conclusions, drawn from the evi-  
dence of the medical men, and supported by portions of the  
petitioner's own testimony, particularly that in which she re-  
ferred to bodily pain, receive strong confirmation from the  
general facts of the case. These people lived together in per-  
fect happiness and contentment from January, 1848, till  
February, 1862, a period of fourteen years, the petitioner's  
mother living near her and seeing her almost daily ; and yet  
no complaint was made, no inquiry set on foot, no failure or  
defect in the husband was imputed. Soon after marriage the  
petitioner had a violent fall on her back : this brought on  
what her mother considered a miscarriage ; attempts are now  
made to explain this incident by referring it to excessive men-  
struation. But two or three efficient answers are given to  
this suggestion : the fact that it supervened upon a fall ; that  
it did not recur ; and finally, that the appearance, though not  
conclusive, for the only infallible test was absent, pointed to  
miscarriage and not menstruation. It appeared further, on  
the petitioner consulting Dr. Black respecting her general

health some years since, she told him she had had three miscarriages, and the result of several conversations which he held at various times with the husband and the wife was, that he actually recommended abstinence from sexual intercourse for a time and separate beds. Finally, the separation and rupture between the parties had no reference to the matters now in controversy, and were not the offspring of distress either mental or bodily caused by the husband's supposed defects; nay more, such distress, which to a greater or less degree is an invariable feature in these cases, does not appear to have had any existence for the lady; she was not conscious of a wish unfulfilled or a desire repressed. If she had been, the delay would have barred her suit; that she was not, is a cogent support to the conclusions I have above set forth. The respondent must be dismissed from the suit.

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Feb. 10 and 11  
and March 12.

—  
L—  
(falsely called  
H—)  
v.  
H—.

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PHILLIPS v. PHILLIPS AND MEDLYN.

April 25.

*Examination of Petitioner's Witnesses de bene esse.—Alimony pendente lite.*

PHILLIPS  
v.  
PHILLIPS  
AND MEDLYN.

On the last day of the sittings the Judge Ordinary allowed the petitioner's witnesses to be examined, though the case was not in the list for the day, on the understanding that, if the respondent and co-respondent intimated their intention to defend the suit, the case should be reheard. The evidence proved adultery. On a subsequent application for alimony *pendente lite*, the Judge Ordinary held that the respondent could not be prejudiced by the evidence so taken; notice meantime having been given that the respondent and co-respondent intended to defend.

This was the husband's petition for the dissolution of his marriage, the respondent and co-respondent had both answered, traversing the charge of adultery, and making counter charges, and the cause was set down for trial by the Court without a

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April 25.

PHILLIPS  
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AND MEDLYN.

jury, at the sittings in and after Hilary Term, 1865. On the 16th of February, the last day appointed for the trial of causes without juries at these sittings, the Judge Ordinary allowed the evidence of the witnesses in support of the petition to be taken, in order to save the petitioner the expense of bringing them up again from Cornwall, although the case was not in that day's list of causes, and no notice had been given to the respondent or co-respondent that it was to be brought on; but on the understanding that the case would be re-tried if the respondent or co-respondent wished to defend the suit. The evidence of the witnesses proved the charge of adultery. Notice was afterwards given that the respondent and co-respondent intended to defend the suit, and it was again set down for trial. On the 25th of April, before it had come on for trial, Dr. Wambey, for the respondent, moved for an allotment of alimony *pendente lite*.

*Dr. Spinks*: If the petitioner's witnesses have spoken truth the respondent is guilty of adultery, and is not entitled to alimony: the question ought to be postponed till after the hearing.

THE JUDGE ORDINARY: I cannot treat what passed in February as a hearing of the cause. I acceded to the petitioner's application to take the examination of his witnesses to save him expense, upon the express understanding that if the respondent or co-respondent desired to defend the suit, the witnesses should be brought up again and the case re-tried. I cannot look at what then took place as any step in the cause. I cannot, because I may have reason to believe, from a collateral proceeding, not a step in the cause, that the respondent has been guilty of adultery, refuse to allot the alimony. Nor can I suspend the decree for alimony till after the hearing. I cannot say that I will decline to hear the respondent's petition for alimony until I have ascertained

whether she has been guilty of adultery. I allot alimony *pendente lite* at the rate of £48 a year.

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April 25.

PHILLIPS  
v.  
PHILLIPS  
AND MEDLYN.

FORSTER v. FORSTER AND BERRIDGE.

Feb. 7, Apr. 20,  
and May 9.

*Application of Damages.—Agreement between Petitioner and Co-Respondent.*

FORSTER  
v.  
FORSTER AND  
BERRIDGE.

After an order made for application of damages the Court will not sanction any agreement between the petitioner and co-respondent, whereby the latter would be relieved from any part of what was due from him; but where, after such an order, the petitioner was put to further expense by appeals and other litigation, the Court varied the original order so as to allow the petitioner to take a larger share of the damages, on the ground that the main intent of the original order had been to reimburse the petitioner the whole expense to which he had been put.

In this case, after a decree absolute for dissolution of marriage, the following order was made in June, 1863, as to the disposal of a sum of £5000 assessed by the jury as damages against the co-respondent:—

“The Judge Ordinary having taken time to deliberate, directed that the sum of £5000, being the damages assessed in this cause, be paid to the petitioner’s solicitor, to be by him applied in the following manner:—That £1000 be paid to the petitioner for his own use; that an annuity for £120 a year be bought in the names of two trustees on the life of the respondent, and that such annuity be paid by the trustees to the respondent so long as she shall lead a moral and respectable life; but should the respondent not lead a respectable and moral life, then that her interest in the annuity should be forfeited, and that the trustees should pay such annuity to the two daughters of the marriage, in equal portions, or to the survivor of them; and that the residue

1865. " of the said sum should be invested in the purchase of equal  
 Feb. 7, Apr. 20, " annuities for the use of the two daughters of the marriage  
 and May 9. " on their own lives; and that a deed should be prepared and  
 ——— " settled by one of the conveyancing counsel of the Court of  
 FORSTER " Chancery, whereby this order should be effectually carried  
 v. " out through the intervention of trustees, and anticipation  
 FORSTER AND " of the annuities should be prevented."  
 BERRIDGE.

Application had been made to the Queen's Bench for a prohibition, and appeals had been presented to the full Court and to the House of Lords by the respondent, the co-respondent, and an intervener.

An agreement had since been come to by the petitioner and the co-respondent that the litigation should cease, and the appeals be withdrawn; that the co-respondent should pay to the petitioner £2700, which it was supposed would cover the costs of the petitioner in the whole litigation; that the co-respondent should also secure an annuity of £120 to the respondent while she lived respectably, and that the petitioner should release the co-respondent from the claim for £5000 damages and costs.

February 7. *Mr. Lawrence*, on behalf of the respondent, moved that the order of June, 1863, might be carried into effect. The respondent is no party to the agreement between the petitioner and co-respondent, and is therefore not bound by it.

*Mr. Lumley Smith*, for the petitioner, and *Dr. Tristram*, for the co-respondent, argued that the agreement was a proper one, and that the respondent had no right to object to it.

THE JUDGE ORDINARY: The agreement may be a very proper and prudent one as between the parties who have entered into it, and this Court would not interpose any difficulty in the way of carrying it into effect if it were satisfied that the respondent and the children of the marriage would

not be injuriously affected by it. But no agreement between the petitioner and the co-respondent ought to deprive the children of the benefit conferred upon them by the order of the Court. The case may stand over that the parties may come to some arrangement as to the interests of the respondent and the children. If they cannot come to such an arrangement the order of the Court must be enforced.

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Feb. 7, Apr. 20  
and May 9.FORSTER  
v.FOERSTER AND  
BERRIDGE.

*Mr. Lawrence* renewed the motion, no further arrangement having been come to. The respondent is, no doubt, not injured by the agreement made between the petitioner and the co-respondent, but by it her two daughters, who, by the order of the Court, would be entitled to annuities out of the damages, are deprived of that benefit.

April 20.

*Mr. Coleridge, Q.C.*, and *Dr. Tristram* for the co-respondent: The agreement ought not now to be disturbed, as the co-respondent, upon the faith that it would be carried into effect, has abandoned his appeal, and has paid a considerable sum of money.

*Mr. Lumley Smith* for the petitioner: The petitioner has not derived any pecuniary advantage from the compromise; he consented to it as the best way of putting an end to the litigation, and is willing to carry it out if the Court will sanction it.

THE JUDGE ORDINARY: The question is a difficult one. On the one hand the interests of the children must be protected; on the other, the co-respondent has parted with a considerable sum of money on the faith of his agreement with the petitioner. I must take time to consider the matter.

*Cur. adv. vult.*

THE JUDGE ORDINARY gave the following judgment: After considering this matter, I am of opinion that the original

May 9.

1865. order of the Court, made on the 23rd of June, 1863, must be  
Feb. 7, Apr. 20, in substance complied with. It appears that the costs between  
and May 9. party and party of the petitioner in the suit in this Court were  
— taxed at £977. 18s., and the damages assessed at £5000.  
FORSTER v. The co-respondent's whole liability amounted, therefore, to  
FORSTER AND £5977. 18s. The Court cannot now with justice relieve him  
BERRIDGE. from the payment of any portion of this sum. It is true  
that he has made an agreement with the petitioner which, if  
it could be adopted in place of the order of the Court, would  
have that effect. But the petitioner had no right to deal with  
the damages beyond the sum of £1000, which was awarded  
to him. This agreement was beneficial both to the petitioner  
and the co-respondent, but not to the respondent or the  
children, both of whom were interested in the full payment  
of the damages. The respondent, who was no party to the  
agreement, claims the enforcement of the order, and is entitled  
to it. But regard ought, I think, to be had to the amount  
already paid by the co-respondent to the petitioner. The  
order will, therefore, stand thus: that the £2700 already paid  
be deducted from the total of £5977. 18s., and that the co-  
respondent do pay the residue, viz., £3277. 18s., to the peti-  
tioner's solicitor within a month, to be applied to the purposes  
and in the manner in the original order of the 23rd of June  
1863 set forth, in all respects, save and except the payment  
of the £1000 thereout to the petitioner, whose claim upon  
that sum is already satisfied. I am aware that in thus treating  
the case I am allowing a larger portion of the damages to go  
to the petitioner than was originally ordered, and consequently  
a smaller portion to the two daughters of the marriage; but  
I consider that the leading intention of the Court was to re-  
imburse the petitioner fully for all the expenses he incurred  
and if the costs to which he was afterwards subjected by  
appeal in the House of Lords had been an existing burden at  
the time the order was made the Court would have relieved  
him from them before devoting the surplus of the damages to  
any other object.



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May 4 and 16.

SWATMAN v. SWATMAN.

SWATMAN

v.

SWATMAN.

*Wife's Petition.—Cruelty.*

Where the evidence of actual violence used by the husband towards the wife is not sufficient of itself to warrant a decree on the ground of cruelty, the Court will take into consideration his general conduct towards her, and, if this is of a character tending to degrade the wife and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to pronounce the cruelty proved.

This was the wife's petition for dissolution of marriage, on the grounds of the husband's adultery and cruelty.

*Dr. Spinks* conducted the petitioner's case.

The adultery was clearly proved, but the Court took time to consider whether a case of cruelty was established; the circumstances are sufficiently referred to in the judgment.

*Cur. adv. vult.*

THE JUDGE ORDINARY gave the following judgment :—

May 16.

On consideration of the evidence given by the petitioner I feel justified in granting her the relief she prays.

The evidence of actual violence on the husband's part was not of a sufficiently aggravated character, standing by itself, though distinctly proved, to warrant the charge of cruelty. But, taken with the rest of his conduct, that charge is, I think, substantiated. The petitioner has been during the latter part of her married life subjected to a continued course of ill-treatment and degradation such as no lady is bound to bear.

Daily intoxication, with late hours at night. Women of the town brought home to his own door, and on more than one occasion introduced into his bed. Adultery committed with his female servants under his own roof, while his wife was then confined, and familiarity with them even in his

1865. wife's presence. These and the like indignities made up a burden which the petitioner's health was unable to bear, and under which she could not be expected to discharge the duties of married life. She quitted her home at length, after a futile trial of promised amendment, and as her husband's adultery was plainly proved, I pronounce a decree *nisi* for the dissolution of marriage, with costs.

SWATMAN  
v.  
SWATMAN.

May 30.

ENTICKNAP v. RICE (falsely called ENTICKNAP).

ENTICKNAP v. RICE  
(falsely called Enticknap). *Suit for Nullity by reason of previous Marriage.—Decree for Confrontation.*

The Court will follow the practice of the Ecclesiastical Court in making a decree of confrontation in fit cases.

This was a petition by a man for a decree of nullity of marriage, on the ground that the woman had been married previous to her marriage with the petitioner, and that at the time when that marriage was celebrated her first husband was alive. The respondent had appeared and traversed the allegations in the petition.

*Dr. Spinks*, for the petitioner, moved for a decree of confrontation in accordance with the practice of the Ecclesiastical Court.

*Dr. Wambey* for the respondent: I cannot resist the motion.

THE JUDGE ORDINARY: I am bound to follow the practice of the Ecclesiastical Court. The process appears to me to be a very useful one. I grant a decree of confrontation.

1865.

(*Before the Full Court*—THE JUDGE ORDINARY, BRAMWELL, B., and  
MELLORE, J., and *before THE JUDGE ORDINARY.*)

April 27 and  
May 30.

ROWLEY

*Form of Decision of Judge Ordinary.—Appeal to the House of  
Lords.*

v.  
ROWLEY.

ROWLEY v. ROWLEY.

By 20 & 21 Vict. c. 85, s. 56, and 23 & 24 Vict. c. 144, s. 3, an appeal lies from the Judge Ordinary, discharging the functions of the full Court by deciding on any petition for dissolution, to the House of Lords: and where the Judge Ordinary had, in substance, disposed of an important question in a suit for dissolution by refusing to give directions for the mode of trial of certain issues, from which refusal no appeal would lie to the House of Lords, the full Court, on appeal, varied the order so as to enable the party aggrieved to appeal to the House of Lords.

Where, on a petition for dissolution of marriage by a wife, the only facts which in the opinion of the Court the petitioner is at liberty to prove would be ground for a decree of judicial separation only, and the petitioner refuses to amend the petition by praying for judicial separation, the petition must be dismissed.

This was originally the wife's petition for dissolution of marriage by reason of the husband's adultery and cruelty, in which, under the circumstances detailed, 3 Sw. & Tr. 338, the Judge Ordinary refused to give directions for the trial of the issues raised, concluding his judgment with the following sentence:—"The result is that the Court declines to further "Mrs. Rowley's suit by giving any directions for the mode of "trial, and on proper application will entertain the question "whether the husband is not entitled to be dismissed from "the suit."

From the order embodying that refusal the present appeal was brought.

*Dr. Twiss, Q.C., and Dr. Tristram, for the appellant,*

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April 27 and  
May 30.

ROWLEY  
v.  
ROWLEY.

urged that, independently of the importance of the question raised by the pleadings, the form in which the decision of the Judge Ordinary had been given, namely, by refusing to give directions for the trial of the issues raised, had virtually deprived the petitioner of the appeal to the House of Lords. By 20 & 21 Vict. c. 85, s. 56, "Either party, dissatisfied with "the decision of the full Court on any petition for the dissolution of a marriage, may, within three months after the "pronouncing thereof, appeal therefrom to the House of Lords," etc. By the 23 & 24 Vict. c. 144, the Judge Ordinary had authority given to him to exercise all the powers theretofore vested in the full Court; and by section 3, "Where there is "a right of appeal to the House of Lords from the decision of "the full Court, there shall be the like right of appeal to the "said House from the decision of the Judge Ordinary alone, "or with any other Judge under the Act." The interlocutory order complained of is not "a decision on any petition "for the dissolution of a marriage." If, on the husband's application, the petition had been dismissed, the appeal would have been to the House of Lords.

Without hearing *Dr. Deane, Q.C. (Dr. Swabey with him)*, for the respondent,

The Court intimated that the right of appeal to the House of Lords ought not to be interfered with: and

THE JUDGE ORDINARY said: When I made the order on the motion for directions as to mode of trial, I expected that the husband would have applied to dismiss the petition. As things now stand, we make the following order:—The husband may apply on any motion day during the term to dismiss the petition; from my decision on that motion an appeal will lie to the House of Lords; if he does not so apply the present appellant to be at liberty to move the Court for

directions as to mode of trial of the issue of adultery subsequent to the 12th of March, 1861.

On the 30th of May *Dr. Swabey* moved the Court, in accordance with the suggestion made by the full Court, to dismiss the petition.

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 ROWLEY  
v.  
ROWLEY.

THE JUDGE ORDINARY asked *Dr. Tristram*, who appeared for *Mrs. Rowley* the petitioner, whether she wished to amend the prayer of the petition by asking for a judicial separation, instead of a dissolution of marriage?

*Dr. Tristram* stated that *Mrs. Rowley* refused to do this, and stood on her right to reopen the whole matter, and on proof thereof to obtain a decree of dissolution.

*Cur. adv. vult.*

THE JUDGE ORDINARY gave the following judgment: If the petitioner in this case had desired a decree of judicial separation, in place of a dissolution of her marriage, it would have been right to give her the opportunity of proving the adultery with which she has charged her husband: but on making her the offer to amend the petition for that purpose, she declined the indulgence, and intimated that she was prepared to take her stand on the petition in its present form, and contest her right in the Court of Appeal to maintain the charge of cruelty as well as that of adultery, and so entitle herself to a divorce. Now, as the cruelty and adultery must concur to entitle her to the only form of relief which she is willing to ask, and as I am of opinion that she cannot, for the reasons I formerly expressed, be permitted to sustain the charge of cruelty in proof, it follows that her petition must be dismissed. In arriving at this conclusion I have endeavoured to give full weight to the ingenious argument by which the doctrine of condonation was pressed into her service; but I retain the conviction that it has no place in the

1865. discussion, for there had been no forgiveness between these parties, and no return to cohabitation as the result of it. So far from it, the bargain they made, and which is now argued to carry within it the character and incidents of condonation, was nothing more than the cession of a doubtful remedy, and nothing less than a contract for perpetual disunion. The petition is dismissed.

May 30.

PROCTOR v. PROCTOR, AND SMITH AND PITMAN.

PROCTOR  
v.  
PROCTOR, AND  
SMITH AND  
PITMAN.

*Petition for Dissolution.—Wilful Separation.—Discretion of Court.*

The petitioner, son of a clergyman, and having taken his degree at Cambridge, married a woman who had been living as a prostitute in Cambridge, on the 13th of June, 1863. Nothing in the nature of continuous cohabitation took place. In October, 1863, the petitioner's father became aware of the fact, and in December, 1863, a deed of separation, under which the respondent was to receive £1 a week, was executed. The adultery proved took place in the early part of 1864. The petitioner was dependent on his father. The Court held that the separation, if wilful, was not without reasonable excuse, and made a decree *nisi*.

This was the husband's petition for dissolution of marriage by reason of the respondent's adultery.

No appearance by respondent or co-respondent.

*Mr. Manisty, Q.C.*, and *Dr. Spinks* conducted the petitioner's case, and

It was proved that the marriage took place in London on the 13th of June, 1863, at St. Pancras, the petitioner being then about twenty-four years old, and having just taken his degree at Cambridge; the respondent had led the life of a

prostitute at Cambridge for several years before the marriage, after which she went back to Cambridge.

In October, 1863, the petitioner's father, who was a clergyman, discovered the marriage, and in December, 1863, a deed of separation was executed by which an allowance of £1 a week was secured to her.

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v.  
PROCTOR, AND  
SMITH AND  
FITMAN.

The adultery proved took place on several occasions in the early part of 1864.

The Rev. William Proctor, the father, said :

I was not aware of his marriage till October, 1863. At the time of the marriage he was entirely dependent on me ; he had no fixed allowance, but I paid his expenses, and he held some scholarships : on the whole his income might be £150 a year. He had no regular allowance in October, 1863. I paid the £1 a week under the deed.

In answer to the Court :

A friend told me of the marriage, and then I consulted my solicitors. My son came home on the 14th of June, and was with me till October, 1863. So far as I know he has never seen his wife since the marriage. I took the matter up entirely—the petitioner was entirely in my hands, but was aware and consented to what I did.

Counsel for the petitioner referred to the case of *Beavan v. Beavan*, 2 Sw. & Tr. 652 ; and

THE JUDGE ORDINARY observed that, in the present case, there was no cohabitation at all between the parties, and that he must take time to consider.

*Cur. adv. vult.*

THE JUDGE ORDINARY : The 31st section of the Divorce Act imposes a difficult and serious responsibility on the Court. If the petitioner shall have been guilty in the opinion of the Court of wilful separation from his wife (or certain other wrongs), "without reasonable excuse," the Court is not to be bound to grant him a decree dissolving the

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PROCTOR  
v.  
PROCTOR, AND  
SMITH AND  
PITMAN.

marriage. The language here used is of great latitude. An opinion has first to be formed as to what, in the particular case, may constitute "reasonable excuse," and then a sort of discretion to be exercised in granting or withholding a decree. The subject could not well have been otherwise treated. The shape or form that the petitioner's misconduct in married life may take, its degree, the length of its duration, its incidents of mitigation or aggravation, its causes and effects—all these have or may have a bearing on the petitioner's just claim to relief, and yet are capable of such infinite variety and intensity, that they escape distinct expression, and refuse to be fixed in a positive and detailed enactment. The duty of weighing these matters has, therefore, been cast upon the Court, and when the cases arising under this section have been sufficiently numerous to unfold any rules of general application, the Court may be enabled to guide itself and others within more narrow limits, by further definition. But until then, the same reasons which have served to make the Legislature express itself with latitude ought to make the Court cautious in restricting itself by precedent. One main end of the Legislature in these provisions was this—that a wife should not first be the object of neglect and ill-treatment, and then the victim of the husband's own wrong. Now, in this case, there certainly was an entire separation after the marriage, but it was acquiesced in by the wife at first temporarily, and soon afterwards by a regular deed of separation, with a weekly allowance. Further, the petitioner, though he had just taken his degree at Cambridge, was without means of any sort, and entirely under the control of his father, through whom the separation was effected, and by whom the allowance was paid. Was this such a wilful separation, without reasonable excuse, as should induce the Court to hold its hands and refuse a decree? I think not. The wife led the life of a common prostitute, both before and after the marriage; she never called upon or de-



sired her husband to live with her, and she has not raised her voice here in complaint or resistance. The mere fact of the separation being the mutual act of both parties may not in all possible cases be enough to constitute "reasonable excuse," though it may go a long way towards it. But the peculiar position in which this young man was placed under his father and his want of means hardly left him an alternative: and the separation, if it can be considered wilful, may with good reason be excused. *Decree nisi for dissolution.*

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PROCTOR  
v.  
PROCTOR, AND  
SMITH AND  
PITMAN.

---

PALMER v. PALMER.

*Decree Nisi, Motion to make Absolute.—Queen's Proctor's Intervention.*

June 6.

PALMER  
v.  
PALMER.

The Court will refuse to make a decree *nisi* absolute, after the expiration of three months from the time when it was pronounced, in order to enable the Queen's Proctor to make inquiries, and to lay a case before the Attorney-General for his directions, upon an affidavit being filed by the Queen's Proctor, to the effect that he has received information of material facts, and that he intends to take the directions of the Attorney-General.

This was the wife's petition for dissolution of marriage. The respondent had not appeared, and a decree *nisi* had been pronounced on the ground of his incestuous adultery.

*Dr. Spinks* moved for a decree absolute, on the usual affidavits.

*Mr. Searle*, for the Queen's Proctor, moved that the decree might be suspended. Certain information had been received by the Queen's Proctor as to material facts, and he is making inquiries into the truth of that information, with the view of laying it before the Attorney-General for his directions. It is understood that the other side consent.

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v.

PALMER.

*Dr. Spinks* : I am not instructed to consent; I claim the right to have the decree made absolute.

THE JUDGE ORDINARY: As the petitioner does not consent the Queen's Proctor must file an affidavit that he is making inquiries into the truth of the information he has received, and that he intends to take the direction of the Attorney-General upon the result of those inquiries within a reasonable time. On such an affidavit being filed the decree will be suspended.

June 13.

BROWN

v.

BROWN.

## BROWN v. BROWN.

*Alimony.—Order for Payment to Wife or her Solicitor.—Practice.*

An order for the payment of alimony to wife's solicitor will not be made without a written authority from her.

In this case the Court allotted alimony *pendente lite* (*Dr. Deane*, Q.C., appearing for the wife, and *Dr. Spinks* for the husband).

*Dr. Deane* asked that the alimony should by the order be made payable to the wife or her solicitor.

THE JUDGE ORDINARY: If the order is required in the usual form, namely, for the payment of the money to the wife or her attorney, there should be brought into the Registry a written authority from the wife authorizing her attorney to receive it. In future no order will be made in that form without such an authority. Upon that authority being brought the Registry, the order will be made.

1864.

May 10, 11, 12,  
13, and July 4.

HARDING *v.* HARDING AND LANCE (the Queen's Proctor  
intervening).

HARDING

*v.*

HARDING  
AND LANCE  
(the Queen's  
Proctor  
intervening).

*Dissolution of Marriage.—Decree Nisi.—Intervention.—  
Charge of Collusion.—Admissibility of Petitioner's Evidence.*

H. petitioned for dissolution of marriage; the respondent answered, and made counter-charges; some evidence in support of those charges was offered at the trial, but a verdict was found for the petitioner on all issues, and a decree *nisi* made. The Queen's Proctor intervened, and alleged the same charges of adultery as had been in issue on the respondent's answer, and collusion:

The Court held that the intervener was not bound to prove the collusion before he went into the question of the adultery.

The petitioner is not a competent witness in a proceeding by an intervener showing cause against a decree *nisi*, nor will the Court examine him under the 43rd section of the 20 & 21 Vict. c. 85, in support of his own petition.

This was a petition by James Harding for a dissolution of marriage, on the ground of his wife's adultery. The respondent had filed an answer, denying the charge of adultery, and making divers counter-charges of adultery against the petitioner.

The cause was tried before the Judge Ordinary at the sittings after Michaelmas Term, 1863. After the petitioner's case had been proved, some witnesses were examined in support of one of the counter-charges, but they failed to establish it, and no evidence was called in support of the other counter-charges, and the respondent's counsel declined to contest the case any further. A verdict was accordingly found for the petitioner on all the issues, and a decree *nisi* was pronounced. Before the decree was made absolute, the Queen's Proctor entered an appearance under the 7th section of the 23 & 24 Vict. c. 144, to show cause against the decree being made absolute, and filed affidavits showing that

1865. the petitioner had been guilty of adultery. Affidavits in reply  
 May 10, 11, 12, had been filed on behalf of the petitioner, and the Judge  
 13, and July 4. Ordinary had made an order, under the 21st of the Further  
 Rules of 1860, that the controverted questions of fact raised  
 by those affidavits should be tried by a special jury. The  
 issues were, whether the petitioner had been guilty of collu-  
 sion, whether he had suppressed material facts, and whether  
 he had been guilty of adultery; the charges of adultery being  
 the same as those contained in the respondent's answer. These  
 issues now came on for trial.

*The Solicitor-General* and *Mr. Hannen* for the Queen's  
 Proctor.

*The Queen's Advocate* and *Dr. Spinks* for the petitioner.

After the *Solicitor-General* had opened the case, and before  
 the witnesses were examined,

*The Queen's Advocate* objected to any evidence being re-  
 ceived in support of the charge of adultery until the charge of  
 collusion had been proved. The charges of adultery made by  
 the Queen's Proctor were identical with those made by the  
 respondent, and no material facts are alleged which were not  
 brought before the Court by the respondent's answer at the  
 last trial. Before those charges can be re-tried it is necessary  
 to show that they were not fairly inquired into at the last  
 trial, in consequence of collusion between the petitioner and  
 the respondent.

THE JUDGE ORDINARY: The objection is wholly untenable.  
 If the construction of the Act contended for by the Queen's  
 Advocate is correct, the course of a petitioner and a respon-  
 dent intending to collude would be easy. They would have  
 nothing to do but to put all the charges that could be alleged

against the petitioner on the record, and to give no evidence in support of them. It appears that at the last trial some evidence was given in support of one of these charges of adultery, but no evidence was offered in support of the two other charges. To say that the Act precludes the Court from inquiring into those charges would be to reduce it to an absurdity. It would be a very short-sighted construction to hold that to make a charge is the same thing as to bring a fact before the Court. The charge is one thing, the fact is another. Some of the facts of which evidence is now to be given have never been before the Court.

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May 10, 11, 12,  
13, and July 4.HARDING  
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AND LANCE  
(the Queen's  
Proctor  
intervening).

Evidence was then given in support of the three charges of adultery alleged by the Queen's Proctor. Some evidence was also given in support of the charge of collusion.

*The Queen's Advocate*, after opening the petitioner's case, called the petitioner as a witness.

*The Solicitor-General* objected.

*The Queen's Advocate*: This is a proceeding of an anomalous character to inform the conscience of the Court whether collusion has been practised on it. It is not "a suit" or proceeding instituted in consequence of adultery," it is a proceeding instituted on the ground of collusion. In *Marris v. Marris and Burke and the Queen's Proctor*, 2 Swab. & Trist. 530, the petitioner was examined by the Attorney-General. *Gray v. Gray*, 2 Swab. & Trist. 554, seems to be against me, but the question does not appear to have been argued, and I ask the Court to reconsider it. The Court has power to examine the petitioner under the 43rd section, *Tatham v. Tatham and Nutt*, 3 Swab. & Trist. 511. The petitioner is able to give the best evidence on the question, and

1865. his evidence ought not to be excluded, for an affidavit of the  
May 10, 11, 12, respondent is before the Court.  
13, and July 4.

HARDING  
v.  
HARDING  
AND LANCE  
(the Queen's  
Proctor  
intervening).

THE JUDGE ORDINARY: I believe my opinion on this subject is perfectly well known. I entertain the strongest opinion that the parties to a suit ought to be competent witnesses, and what is said about the hardship of excluding them, a hardship which is equally felt on both sides, has my entire concurrence. But I must look to the language of the statute. There can be no doubt, after all that has passed in this Court, that if this proceeding is a proceeding in a suit instituted in consequence of adultery, it falls within the express words of the statute, and the evidence of the parties is excluded. Therefore, the only question I have to ask myself is, whether this is a proceeding in a suit instituted in consequence of adultery. I have no doubt that it is. The state of things is this. The petitioner filed his petition. The respondent pleaded to it. The case was tried, a verdict was delivered, and a decree *nisi* granted; and before the decree was made absolute the Queen's Proctor intervened, as one of the public, under sect. 7 of 23 & 24 Vict. c. 144, and alleged that material facts had not been brought before the Court, and that there had been collusion, and on those grounds showed cause—against what?—against the decree being made absolute. Until the decree is made absolute the original suit is pending. There can be no doubt that an inquiry, the sole object of which is to ascertain what should be the result of the suit, is an inquiry in the suit. In passing, I may notice the suggestion made by the Queen's Advocate, that the wife's affidavit has been admitted. The wife may have made an affidavit for the purpose of informing the Court, but it is not in evidence before the jury, and it is wrong, therefore, to say that the wife has been allowed to give evidence. Then I am asked to exercise the discretionary power given me by the 43rd section. No doubt I could examine the petitioner under that section, but I have, with very

rare exceptions and on special grounds, uniformly refused to exercise that power where the other party has appeared in the suit, and cannot be called to contradict the petitioner's evidence, except when the petitioner has been examined adversely, as was the case in *Marris v. Marris and Burke*. There the Queen's Proctor charged connivance, and said, "If the Court will let me examine the petitioner, I will prove connivance out of his own mouth." That mode of proceeding used to be adopted in the House of Lords, but it has never happened that where both parties have appeared the petitioner has been allowed to be examined under that section for the purpose of proving his own case. I, therefore, decline to exercise the discretion given me by that section in favour of the petitioner.

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13, and July 4.HARDING  
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The petitioner's evidence was accordingly rejected.

*The Queen's Advocate*, in his address to the jury, contended that the question of collusion ought to be left to them before the question of adultery, and that if they found there was no collusion, they ought not to be called upon for a verdict on the issue of adultery.

THE JUDGE ORDINARY: I shall take the opinion of the jury upon both these questions.

Both issues were accordingly left to the jury, who found that the petitioner had been guilty of two of the charges of adultery, but that he had not been guilty of collusion.

*The Solicitor-General* (Mr. Hannen with him), for the Queen's Proctor, moved that the petition might be dismissed.

July 4.

*Dr. Spinks*, for the petitioner, moved that the decree *nisi* might be made absolute on the following grounds:—first, that the intervention was after the expiration of three months from

1865. the date of the decree *nisi*;\* secondly, that the intervener,  
 May 10, 11, 12, not having proved collusion, was not entitled to give evidence  
 13, and July 4. in support of charges against the petitioner which the re-  
 spondent had made in her answer and had failed to establish,  
 HARDING v. and upon which the petitioner had obtained a verdict.

HARDING AND  
 LANCE  
 (the Queen's  
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 intervening).

*The Solicitor-General and Mr. Hannen, contra.*

THE JUDGE ORDINARY: I am of opinion that the petition must be dismissed. The questions raised on behalf of the petitioner turn upon the meaning of the 7th section of the 23 & 24 Vict. c. 144. That section establishes an entirely new system for the granting of decrees in cases of dissolution. It enacts that every decree shall in the first instance be a decree *nisi*, and it then goes on to provide for a very peculiar and anomalous state of things, namely, for the intervention before the decree is made absolute, not only of a public officer, but also of any one of Her Majesty's subjects, for the purpose of raising the question whether the petitioner has been guilty of adultery, or of any other misconduct which disentitles him to the relief he seeks. The words are, "and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court." In this case the Queen's Proctor showed cause by reason of material facts not having been brought before the Court up to the time when he introduced them to its notice. But it is argued that the meaning of these words is to be limited, and that "material facts" are to be read as "material charges." The suggestion is, that the power of intervention given to any

\* On this point, see *Bowen v. Bowen and Queen's Proctor*, 3 Sw. & Tr. 530.



one of the public is to be confined to matters which have not been pleaded by any of the parties to the suit. I think that the Court ought not so to alter the words "material facts" upon any speculation as to the intention of the Legislature using them. But even if the Court were entitled to alter the words in the manner suggested, I own that I am utterly at a loss to see that in making such an alteration it would be giving effect to the intention of the Legislature. The very fact that the Legislature provided for the intervention of third persons, and of the public officer, shows that it entertained some distrust of the opposite parties to the suit, and doubted whether a respondent or co-respondent would be able or willing to bring to light all the facts which ought to be laid before the Court. It seems to me that I should be robbing this enactment of that which gives effect and life to it if I were to hold that from the moment when the respondent has put a certain charge into an answer (although she may have given no evidence in support of it), the right of one of the public to intervene and prove the truth of that charge is taken away. I cannot put that construction on the statute. The charge of adultery having been brought home to the petitioner, I rescind the decree *nisi* and dismiss the petition.

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13, and July 4.HARDING  
v.HARDING AND  
LANCE  
(the Queen's  
Proctor  
intervening).

## CHETWYND v. CHETWYND.

July 18.

*Petition for Custody of Children.*—22 & 23 Vict. c. 61, s. 4.—  
*Intervention.*

CHETWYND  
v.  
CHETWYND.

When a petition for the custody of children after a final decree of dissolution is before the Court, persons, other than the parents, may intervene and bring before the Court such facts as in their opinion the interests of the children may require. The form of such intervention will be by petition, and the interveners act at their own risk as to costs.

This was the wife's petition for dissolution of marriage on

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CHETWYND  
v.  
CHETWYND.

the ground of her husband's adultery and cruelty. A decree absolute for the dissolution of the marriage was pronounced on the 2nd of May last. The petitioner had since filed a petition for an order as to the custody, maintenance, and education of the children of the marriage, and an answer had been filed by the respondent.

*Mr. Staveley Hill*, on behalf of Sir George Chetwynd and Lady Hanmer, the uncle and aunt, and also the godfather and godmother of the two children of the marriage, moved that they might have leave to intervene and plead upon the question of the custody, maintenance, and education of the children. The children are minors, and in the absence of their parents, the persons who wished to intervene are their natural guardians. The 35th section of the 20 & 21 Vict. c. 85, coupled with the 4th section of the 22 & 23 Vict. c. 61, gives the Court the power to make what orders it thinks proper with respect to the custody of the children, and some one should be allowed to represent the children, if necessary, before any such order is made. It is the practice of the Court of Chancery to allow any person to appear on behalf of the children: *Daniell's Chancery Practice*, cap. on Guardians; *Sturtin v. Bartholomew*, 6 Beav. 143; *Sale v. Sale*, 1 Beav. 586. [THE JUDGE ORDINARY: The two sections on which you rely seem to indicate that there are cases in which it is proper that proceedings should be taken in Chancery.]

*Mr. Hill*: If the Court will not allow us to intervene, we must apply to the Court of Chancery.

*The Queen's Advocate*, for the petitioner, opposed the motion. The question is one of pure principle. No person has a right to be heard upon the petition, except one of the parties to the suit. There is no necessity for such intervention, and it would lead to grave inconveniences; for a

guilty respondent might put forward third persons to attempt to deprive the petitioner of the custody of the children. There is no analogy between the jurisdiction of this Court and that of the Court of Chancery with regard to children ; the power of this Court to make orders respecting them is merely incidental to the suit. *Grant v. Grant and others*, 2 Swab. & Trist. 522, although not a direct authority on the question, seems to show that, in the opinion of the late Judge Ordinary, an intervention for this purpose could not to be allowed.

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*Mr. Hill* in reply : The power of the Court is not incidental to the suit, because it can make the order after the suit is at an end.

THE JUDGE ORDINARY : The question that has been raised for the first time under these two sections is, whether the application which they obviously contemplated was to be made to the Court for an order as to the custody, maintenance, and education of the children of the marriage, must necessarily be made by the parties to the suit or one of them ; or whether the Court is at liberty, in order to carry out the intention of the Legislature, to allow third persons to come forward and make it. Now the sections are most general in their terms. If they had been intended only to enable the Court to decide between the rival claims of the parties to the possession of their children, which all parents covet, it is clear that the parties alone ought to be heard on that question ; but I think they have a far wider scope. It was the obvious intention of the Legislature that the Court should have the power to make such orders as it might think necessary for the benefit of the children themselves ; and it could not properly exercise that most useful power if it were to decline altogether to hear what third persons had to say on the matter. It might be that a worthless father and mother having been divorced, both of them might marry again, and neither of them might be

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willing to have the care of the children. It would be a great misfortune if this Court were to abdicate the power given to it by those sections by holding that no third person could intervene for the benefit of the children. I think, therefore; it ought to hold that when any third person shows sufficient cause to justify his intervention, he ought to be allowed to intervene. Without intimating any opinion upon the question whether the intervention is likely to be successful, or whether the intervener will have to pay the costs caused by the intervention, it is enough to say that I think a third party ought in proper cases to be allowed to intervene, and bring before the Court the facts on which he relies in support of his intervention. There is now before the Court a petition by the wife for the custody of the children and an answer of the husband. I think the intervention ought to be in the form of a petition. The intervener must file a petition within ten days. The most convenient course will be to bring the case on by motion, when the pleadings and the affidavits have been filed.

June 8.

ELLIS v. ELLIS AND SMITH.

ELLIS

v.

ELLIS AND  
SMITH.*Adultery of Wife.—Condonation.*

Before the Court can come to the conclusion of condonation by the husband, it must be satisfied that the husband continued to live with his wife with full knowledge of the acts of adultery alleged to be condoned.

Where, to an action for maintenance, the husband had alleged the wife's adultery, but failed to prove it, and afterwards lived with her, the Court refused to come to the conclusion of condonation.

This was the husband's petition for dissolution of a marriage on the ground of his wife's adultery. The respondent and the co-respondent pleaded a denial of the charge, condonation, and other pleas. Issue was joined on these pleas, and the

cause was tried before the Judge Ordinary, without a jury, on the 7th and 8th June.

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ELLIS  
v.  
ELLIS AND  
SMITH.

*Dr. Spinks* for the petitioner.

*Mr. Temple*, Q.C., and *Mr. Searle* for the respondent.

*Mr. Littler* for the co-respondent.

The petitioner was an engineer employed on a railway at Birkenhead ; he married the respondent in 1848, and in the latter part of 1859 and in 1860, whilst they were living at Birkenhead, she was in ill-health, and was attended by the co-respondent, a surgeon at Liverpool. The adultery was alleged to have been committed in November and December, 1859, and the early part of January, 1860, while the respondent was lodging at the house of Mrs. Caley, at Liverpool, and in the latter part of January, 1860, and during the month of February, 1860, whilst she was lodging at the house of Mrs. Evans, at Liverpool. Mrs. Evans was the principal witness in support of the charge of adultery. The petitioner and the respondent had continued to live together from February, 1860, until the summer of 1861, when he separated from her, and she went to live with her sister, Mrs. Naylor. In November, 1861, Mr. Naylor brought an action against him in the County Court for her maintenance, and he set up the defence that she had been guilty of adultery with Mr. Smith, and examined witnesses in support of the charge, but failed to establish it. Mrs. Evans, however, was not examined at the trial. After the trial a meeting took place, at which the petitioner, the respondent, Mr. and Mrs. Naylor, and a man named Colvin, were present, when the charge of adultery against the respondent was talked over, and the petitioner said that he did not believe that she was guilty. He spoke of Mrs. Evans's accusation against her, but said he thought it was made out of spite and he did not believe it. A reconcilia-

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tion was effected, and they lived together for several weeks. In the middle of December, 1861, she left him, in consequence, as she alleged, of his ill-usage, and he was subsequently taken before the magistrates on two occasions, on the charge of deserting her. He again set up the defence of her adultery, but was ordered to contribute to her support. He then made her an allowance of 8s. a week, and in February, 1863, he filed this petition.

*Mr. Temple* as to condonation. There was a long cohabitation after the last act of adultery charged, and all the evidence by which the charge was supported was known to the petitioner in November, 1861, and with that knowledge he returned to cohabitation with the respondent. Either he had reason to know that the evidence was false, and did not believe it, or, believing it to be true, he condoned his wife's offence. The adultery has not been proved, but if it has been proved, it has also been proved that there was condonation.

*Dr. Spinks* : When the petitioner returned to cohabitation, he did not believe that his wife was guilty, although some of the evidence against her was, no doubt, known to him. If he did not believe her to be guilty, he could not have condoned. He has since become convinced that she was guilty, and if the adultery is proved, he is entitled to a decree notwithstanding the cohabitation in November and December, 1861.

THE JUDGE ORDINARY in giving judgment said, that the evidence of Mrs. Evans was sufficiently corroborated to induce the Court to give credit to it, and he was satisfied that adultery had been committed by the respondent. After going through the evidence on this point he proceeded :—It is said, however, that there has been condonation, and there is a good deal in the evidence as to this part of the case which requires

to be narrowly looked into. Now, the essence of condonation is forgiveness. In order to establish condonation, it is not enough to prove that the husband took his wife back after certain facts had come to his knowledge, after certain intelligence had been communicated to him tending to prove her adultery ; it is necessary to prove that the husband took his wife back with the intention of forgiving her, believing her to be guilty. If the evidence leads the Court to the conclusion that the husband did not thoroughly believe that his wife had been guilty, and therefore did not forgive her when he took her back, condonation is not established. It is very difficult to trace the movements of the petitioner's mind as first one and then another piece of evidence as to his wife's conduct was communicated to him. On the one hand it is said, that at the time of the trial in the County Court, in November, 1861, he knew all that was to be said against his wife. On the other hand it is said, that although he knew in general terms that Mr. Evans charged his wife with adultery, he did not know all the evidence which has now been produced ; that he did not know the facts spoken to by Mrs. Caley and by her daughter, which have led the Court to the conclusion that adultery was committed. The evidence, as far as I can trace it, points to that conclusion. On the Saturday after the trial in the County Court, Ellis told Mrs. Naylor that Mrs. Evans could prove his wife's adultery, and Mrs. Naylor says that they dissuaded him from parting with his wife, and she and Colvin persuaded him that no adultery had been committed. Both Mrs. Naylor and Colvin agree that he said he did not believe that adultery had been committed, and he thought that Mrs. Evans had made the charge against her out of spite. The evidence of condonation falls short in that respect. In a case of this kind, the Court ought to see its way very clearly to the fact of condonation before it comes to that conclusion. I am not satisfied that when the husband and wife lived together in November and December, 1861, he believed that she had committed

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1865. adultery, and that he took her back intending to forgive her. The result is, that I pronounce a decree *nisi*, with costs against the co-respondent.
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June 27.

RAWLINS *v.* RAWLINS.

RAWLINS  
*v.*  
RAWLINS.

*Dissolution of Marriage.—Annuity to Wife.—20 & 21 Vict.  
c. 85, s. 32.*

Under the above section, the Court can order an annuity to be secured to the wife only on making the decree ; the order, therefore, would be permanent and incapable of being varied to meet the varying fortunes of the husband.

Where the husband's income was professional, and the wife was entitled to a sum of money in reversion, which was imminent, the Court refused to make any order under the section.

The Court ought also to consider the conduct of the parties.

This was originally the wife's petition for dissolution of marriage by reason of the husband's cruelty and adultery. There was issue of the marriage.

On the 15th of February, 1865, a decree *nisi* for dissolution of the marriage was made.

On the 27th of June the Court was moved by *Dr. Deane*, Q.C. (*Mr. T. J. Clark* with him), to make the decree absolute, and to order the husband to secure some annual sum of money to the petitioner.

The 20 & 21 Vict. c. 85 s. 32, enacts that,

"The Court may, if it shall think fit, on any such decree order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties, it shall deem reasonable, etc."



Affidavits were filed by both parties, but the respondent did not appear by counsel on this motion.

The respondent's income was small, and from his profession of attorney only. The petitioner had no present income, but was entitled to a reversionary interest on the death of an aged mother.

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v.  
RAWLINS.

THE JUDGE ORDINARY: I have great difficulty in dealing with this case. [The learned Judge read the section above cited.] Under this section the Court has not the power of providing for the case of the varying fortunes of the husband; the order can be made only on the decree for dissolution, and is, therefore, of a permanent character. As to the facts of the case, first, the husband's income is professional, and therefore liable to variations; secondly, the wife is entitled to a considerable sum in reversion, which is imminent. By the terms of the section the Court should consider the conduct of the parties. On the whole I think no order should be made in this case.

*Decree absolute.*

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MANTON v. MANTON AND STEVENS.

July 11.

*Dissolution of Marriage.—Unfounded Claim for Damages.—Costs.*

MANTON  
v.  
MANTON AND  
STEVENS.

Where damages were claimed from a co-respondent, and it appeared that the respondent was leading an abandoned life when the co-respondent made her acquaintance, and there was evidence raising a strong suspicion that the petitioner must have been aware of that fact:

HELD, that the co-respondent ought not to be condemned in costs, on the ground that the claim for damages was, under the circumstances, improper.

This was a petition by a husband for a dissolution of mar-

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July 11:  
—  
MANTON  
v.  
MANTON  
AND  
STEVENS.

riage, and claiming damages from the co-respondent. The respondent and co-respondent had filed answers denying the adultery. The issues came on for trial on the 7th of July, before the Judge Ordinary by a common jury.

*Mr. Serjeant Tozer and Dr. Spinks* for the petitioner.

*Mr. Searle* for the respondent.

*The Queen's Advocate and Dr. Tristram* for the co-respondent.

The marriage took place in 1854. In April, 1864, the petitioner, who was a schoolmaster at Notting Hill, traced the respondent to a brothel, with the co-respondent, who was the landlord of a tavern near the petitioner's residence. The adultery was clearly proved; and after some evidence (which is stated in the judgment) had been given on behalf of the corespondent, showing that the respondent had been leading an abandoned life, the claim for damages was withdrawn. The jury found a verdict for the petitioner, and a decree *nisi* was pronounced.

*Mr. Serjeant Tozer* moved that the co-respondent might be condemned in costs.

*Dr. Tristram, contrà.*

*Cur. adv. vult.*

THE JUDGE ORDINARY: This was a very peculiar case. The petitioner married in 1854, and lived for several years with his wife. It appeared from the evidence that as early as 1861, or the beginning of 1862, the wife began to lead an abandoned life, and it was proved that she had committed adultery with three other men besides the co-respondent. It was also proved that she was to some extent addicted to

drinking. There was evidence, but it was no doubt slight, that previous to the marriage her character had been immoral, and that the petitioner had been in the habit of having connection with her ; and there was evidence, but still weaker, that before the marriage she had had connection with the petitioner's brother. Her intercourse with the co-respondent must have commenced about the beginning of 1862 ; and about the same time, or rather earlier, she had, if the witness Badger can be believed, commenced an adulterous intercourse with Badger. In the course of 1863 she took furnished lodgings in another part of the town, under the name of Leslie, and there carried on an adulterous intercourse with another man. It also appeared that the man Badger used to be very often (he said every night) at the husband's house, carrying on the most open adultery, almost under the husband's eye. The Court was a little surprised at another part of the evidence, tending to show that she was in the habit of going out at night alone, when her husband was at home, and not returning until a late hour. All these circumstances gave the case a very peculiar aspect. Then comes the question whether, considering all these circumstances, and some others I am about to mention, there is any ground for condemning the co-respondent in costs. It appeared to be doubtful whether the co-respondent knew that the respondent was a married woman. I suspect, although it was not very plainly made out, that he did know it. I cannot, however, shut my eyes to the circumstance that the petitioner, desiring to get rid of such a wife as this, thought fit to make a claim against the co-respondent for damages. In consequence of that claim the co-respondent has been obliged, at a great expense to himself, to bring witnesses and engage counsel for the purpose of exposing the respondent's real character, and resisting the claim. The real contest between the petitioner and the co-respondent was as to the character of the respondent ; and in that contest the co-respondent has been successful. I think I should not be doing justice if I

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AND

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1865. were to condemn the co-respondent in costs, and I shall make  
 July 11. no order whatever as to costs.

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ROWE v. ROWE.

June 13 &amp; 20.

ROWE

v.  
ROWE.*Judicial Separation.—Withdrawal of Wife from Bed.*

To the wife's petition for judicial separation, on the ground of the husband's cruelty and adultery, an allegation on his part that the wife had wilfully withdrawn herself from his bed, and refused him conjugal rights, is no answer.

This was the wife's petition for judicial separation. The petition alleged a marriage in 1843, cruelty and adultery from November, 1862, till the filing of the petition.

The respondent by his answer traversed the cruelty, alleged condonation as to the cruelty, traversed the adultery, alleged condonation as to the adultery, and pleaded, fifthly, that on "divers occasions since the marriage between the respondent and the said Sarah Rowe, and particularly from the month of February, 1864, until the filing of the petition, the said Sarah Rowe, without any reasonable cause, and notwithstanding the repeated remonstrance of the respondent, withdrew herself from the bed of the respondent, and refused to render him conjugal rights."

*Dr. Spinks* moved to amend the answer by striking out the fifth paragraph. The matter alleged in that paragraph is no answer to a suit for judicial separation on the ground either of adultery or cruelty; and it is not pleaded as a provocation of the cruelty alleged in the petition.

*Mr. Searle*: This objection is not taken on demurrer, but is an application to the discretion of the Court to amend an answer. I submit that the fact alleged is material for the

Court to consider in determining whether the petitioner is entitled to the relief she prays. Without saying that any decided case shows that such matter has been held to be a plea in bar, the judges of the Ecclesiastical Courts have admitted evidence of such conduct, and have given it their consideration in granting or refusing a decree. *Forster v. Forster*, 1 Consist., 154; *Clowes v. Clowes*, 4 N. C., 12; Bishop on Marriage and Divorce, Sect. 397. *Cur. adv. vult.*

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THE JUDGE ORDINARY gave the following judgment:—The respondent in this case has put in an answer denying the cruelty and adultery charged, and pleading condonation. The answer has no further allegation but the following. (The learned Judge read the paragraph above set out); and the question is whether such allegation should be allowed to remain. There is no doubt, after the case of *Orme v. Orme*, 2 Add. 382, that although this Court enforces conjugal cohabitation, it does not pretend to enforce marital intercourse. The reasons why it does not embark in such an attempt are sufficiently obvious. But on this very ground perhaps a complaint of this nature ought to receive its full weight as matter of recrimination. The matter here complained of ought to, and does oftentimes find a place in that general review of conjugal life which, on a question of cruelty or even of recrimination, is in such cases imposed on the Court. Such a matter may therefore find its way into the evidence, and though perhaps more rarely into the petition or answer, it is strong evidence of aversion, and may in many cases be far from immaterial. But the question is, whether it is material in this case, and I cannot decide that it is without holding that standing alone as it does, and without any allegation of other misconduct, it would, if proved, constitute in itself a bar to the petitioner's suit. This I cannot say; it must therefore be struck out.

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COUSEN v. COUSEN.

*Wife's Petition.—Legal Cruelty.*COUSEN  
v.  
COUSEN.

Indifference, neglect, aversion to the wife's society, cessation of matrimonial intercourse, without personal violence or words of menace, do not amount to legal cruelty, though the husband is carrying on an adulterous intercourse with a servant under the same roof where he is residing with his wife.

This was the wife's petition for dissolution of marriage by reason of the adultery and cruelty of the husband.

The evidence of the petitioner, as given below, was taken in the first instance before one of the Registrars of the Court, on account of her state of health.

The case came on in due course on the 4th of May, 1864, when the husband's adultery with a woman servant under the roof where he was living with his wife was proved, and the evidence of the petitioner, as follows, read :—

I was married to Mr. Cornet Bacon Cousen, the respondent, on the 23rd of April, 1861. My name was then Moncrieffe Macintosh. We were married at St. James's Church, Piccadilly. After spending a few days at Brighton, we went on May 1st to Bradford, to the house of the father of respondent. This was by arrangement; we had agreed to stay there for a year or a year and a half. My husband had stone quarries; he had a share in them. They were principally his father's. I had been acquainted with respondent for four years before our marriage. I had not seen much of him before the previous summer. We continued to reside with my husband's father until the last week in July, 1862. My husband's conduct was unkind during May, June, and July, but not so unkind as he became afterwards. I went to London by myself at the end of July to see my mother, who was ill. My husband had no objection. He gave me some of the money to pay the railway ticket from Bradford to London, but not

all; I had to supply the rest. He joined me in London the beginning of August. We stayed with my mother in Jermyn Street. We were in town together about a fortnight. His conduct during that fortnight was very unkind, inasmuch as he would go out about nine in the evening and stay out until five or six in the morning. He generally did that every evening; sometimes he stayed out until three, sometimes until five or six in the morning. I complained of his conduct, so far as that I told him I wished he would stay at home sometimes or take me with him. I did not sit up for him. He took no notice of my complaint. He spent part of the day during the fortnight with me. He took me to no places of amusement either during the day or the evening. He did not tell me where he passed his nights. We returned to Bradford together about August 17th following. On his return his conduct was not so bad; he did not go out at night so much. I do not recollect he did so more than once. He went to the Isle of Man the third week in September. He did not ask me to go with him. He did not tell me he was going. I only found it out from his friends the night before. I told him I heard from his friends that he was going. He said, "Yes, he was." He remained at the Isle of Man three or four days. On his return I thought he became more unkind, rather more disagreeable in all ways; he showed it in not speaking to me, not speaking so much as before. He did not court my society. He very seldom came to me. He was out of the house more than once or twice; he was out late at night. In November he went away about nine one evening and stayed away three or four days. I did not know he was off until he had gone. Neither before he went nor after he came home did he tell me where he had gone to. He was away three days. He gave me no reason for his absence. I asked him, but he gave me no reason. I cannot recollect that he gave me any reason, except that he chose to stay away. When he returned he remained at home one night. He went

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1864. away again in a pony-carriage about three in the afternoon,  
May and June. and stayed away all night. He did not tell me where he was  
going. I did not know he was going until he drove off. I  
1865. had no quarrel with him. He was away one night. The  
June 15 and next night he came back about twelve. I was in bed. He  
July 18. did not tell me where he had been. He brought a dog  
with him. This was the latter end of November. It was a  
cross, bad-tempered dog, not a very large dog. He insisted  
on having the dog in bed between us. I objected to it very  
much, and begged that the dog might be left downstairs.  
It was not taken downstairs. He insisted in keeping it in  
bed all night. We had the dog there (in bed) the first night  
and also one or two nights following. I could not sleep whilst  
the dog was there, I was so frightened. It was lying on the  
pillow between us near my shoulder. I complained to him  
of this, and said I particularly disliked dogs in bed. I do not  
know that any of his family complained to him about the dog  
at that time. The dog was afterwards sent away. My hus-  
band from that time was away for several days and nights  
too. He remained away the whole night on each occasion.  
Every week he would go away on Friday or Saturday night  
and stay until Monday. On other occasions he would go  
away Wednesday or Thursday and stop one night. He never  
gave any reason for his absence on these occasions. I asked  
him several times. I do not think business had anything to  
do with it; he never said that it had. This conduct continued  
from November until the time I left in July 1862. Whilst I  
remained in this house near Bradford he continued to live  
the same house with me, and we occupied the same room and  
the same bed; although we occupied the same bed we ceased  
to cohabit as man and wife from November 1861 to July  
1862. He gave me no reason for so doing. I used to re-  
monstrate about his general unkindness and stopping away  
all night; but I was not cross very often. When he slept in  
my bed he left my bed for an hour or longer. His dressing-

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room was some way off at the end of the passage. After an absence for an hour or more he would return and remain in my bed for the rest of the night. When he left my bed he did not tell me on these occasions where he was going. When I was awake he would ask me why I was not asleep; he did not like people who were always awake. It would be about twelve o'clock he left my bed; the rest of the family had gone to bed. He undressed in his dressing-room. On several occasions he came into my room, undressed, and went away again without getting into bed. He did not speak to me. After that he would remain an hour before he came to bed; sometimes I would wake and find he was away. I spoke to him several times and asked him why he went away in that way, but he never gave any reason. I told him his father and mother must be surprised to hear him walking about in that way. From November to July 1862 it occurred most nights when he was sleeping at home. He came into the room and went away, or got up from bed and went out, more frequently the latter. I was not always awake when he went out; I woke up and found him absent. His conduct during the day at this time was generally very unkind. We hardly ever went out together. At home he objected to sitting in the same room with me. If we were alone, he told me to go away; if any one else was there, he would go away. He gave me no reason for this conduct; I asked him several times, he gave me no reason. He never told me he had taken a dislike to me. We had no sitting-room of our own; our sitting-rooms were common to the family. He sat in the kitchen when he left the room. If I spoke, he would find fault with my manner of expressing myself. Sometimes he would give me no answer at all. In January, 1862, I went over to Leeds with him. We had lunch together. He left me after lunch. He said he would come back at four o'clock. He left me about two P.M. I objected to his leaving. I was afraid I should not find him again. He did not appear the whole evening; I

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stopped until seven, when the shop was closed at which I was. I went home; I walked about until four, and stayed in the shop from four to seven. I saw nothing of him that night. I saw nothing of him until nine o'clock the following night. When he came home, he said he met some friends who detained him after the hour agreed upon. He did not say where he had been during the night. Towards the end of March, 1862, I went to Scarborough, on a visit to my mother and sisters, for four or five weeks. He did not object to my going, but he objected to give me money to pay for my ticket. He did not write to me whilst at Scarborough. I wrote once to him, but he took no notice of my letter. On my return to Bradford he continued to behave as before, quite as bad. On June 1st Mr. Cousen went to Inkley and returned the following night. I was in bed. He came to my bedroom. He was undressed. I was awake. He said he had come back. He brought the same dog he had before. He went away for a short time and returned, bringing the dog in his arms. The dog slept in the bed between us. I objected very much and told him so, for I knew I should get no sleep. The dog remained all night. I was awake. I was awake the whole night, and was stiff and pained the next day from lying in one position on account of it. The next day, in the afternoon, he tried to set the dog on me; it was savage. It rushed at me, and barked every time I came into the room. My husband urged the dog to bite me. In the evening, in the kitchen, he took the dog upon his knee and set the dog on me. I told him not to do it. My husband persisted, and I took up the poker and said I would strike the dog if it bit me. I was very much frightened. I have a horror of being bitten by dogs; my husband knew that. He persevered to make the dog bite me until his father and mother came in from the noise, and he desisted after that. I said that sooner than have the dog in bed I would sit up all night in the kitchen. I asked his mother

to interfere. She told him it was very unreasonable to have the dog in bed, as I disliked it so much. His conduct had an effect upon my health so far that I felt generally poorly. Shortly before I left, after I came back from Scarborough, several times I asked my husband the reason of his conduct; sometimes he would turn away and not answer. On one occasion I said I thought he might answer when I spoke to him, and he said, "What do you want me to say?" I said, "I think you might say you would behave a little better to me." He answered that I need not expect he would ever do so. He was writing all the time. He always pretended to take no notice when I spoke to him. On one occasion I asked him why he behaved as he did, and why he did not live with me as his wife. His answer was, he did not intend to do so again. He gave no reason, though I asked him several times. This conduct I have been speaking of continued down to the time when I left, 25th of July. I then went to Leeds. I knew an old lady who lived there. I told my husband I was going to leave him. He did not endeavour to prevent my leaving him. I have never heard from him since. He has never written or been to see me since. I have been living with my mother ever since.

Cross-examined by *Dr. Swabey* on behalf of the respondent:

I was on good terms with my mother-in-law, and, living under her roof for some time, I was tolerably intimate with her. Miss Cousen, a sister, and a brother of my husband, lived in the house at Bradford besides his father and mother. I was on good terms with my sister-in-law. Of the stone quarries, one was in Bradford, one two miles from Bradford, one still further distant. The care of the quarries did not oblige my husband to travel; he ought to have been at his office. His office was at Bradford. When I came to London he paid part of my railway fare. He paid all going to

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1864. Scarborough, after much grumbling. I paid the rest of the  
May and June. fare to London out of my pocket-money. I had no income  
of my own. My mother was in lodgings in Jermyn-street.  
1865. I occupied a bedroom in Jermyn-street, near the top of the  
June 15 and house. A bedroom to myself. The size of the dog was not  
July 18. so large as that of a Skye-terrier. I did not on the night the  
dog slept in our bed offer to leave the room. On the first  
occasion I told my mother-in-law and sister-in-law that I  
disliked very much the dog being in bed. On the occasion in  
the kitchen the dog was never off the knees of my husband.  
He took it off the floor and held it; when his father and  
mother came in he let it down, and it then rushed at me. In  
the winter of 1861-62 my health was pretty good. I had a  
cold once, but it was nothing. Besides my husband's conduct  
as to the dog, I complained to Mrs. Cousen, my husband's  
mother, of his conduct two or three times some months before  
I left. I complained of the manner in which my husband  
lived with me, and of his general conduct. She said she was  
sorry to see we lived so unhappily. She did not like to inter-  
fere, but if I wished it she would speak to him. I told Mrs.  
Cousen, before I went away on the 25th of July, that I was  
going. I told her I was going, and did not intend to re-  
turn.

Re-examined :

My husband got £2000 belonging to me when I married him. It was not settled upon me, he got it altogether. On the first occasion, when the dog slept with us, I said I did not offer to leave the room, there was no other room in which I could have slept. I did, when I complained to Mrs. Cousen, the mother, tell her my husband had not lived with me as a husband for some time; I think I told her so: I cannot say my exact words. When I spoke to Mrs. Cousen about leaving on the 25th of July, I told her that it was on account of what I had found out about Walker, a servant, then in the house.

This evidence showed a case of aversion, howsoever arising, on the part of the husband towards the wife, but the question was whether it amounted to legal cruelty?

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*Dr. Spinks*, for the petitioner, argued that the conduct of the husband, viewed in connection with his adulterous intercourse with a servant under the same roof, amounted to cruelty, so as, with the adultery, to found a decree of dissolution.

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*Dr. Swabey* watched the case on behalf of the respondent.

The Judge Ordinary refused to make any decree till the petitioner was able to attend and be examined in court, which was done on the 14th of June, when she repeated in substance the evidence taken before the Registrar.

The Judge Ordinary again refused to make any decree till either the father, mother, brother, or sister of the husband under whose roof the cohabitation took place should have been produced as a witness.

On the 15th of June 1865, the respondent's father was accordingly examined, but his evidence threw little if any further light on the matter, and the Court again desired time to consider the effect of the evidence.

On July the 18th, THE JUDGE ORDINARY gave the following judgment:—The Court is not at liberty to dissolve this marriage. Proof was given at the trial of a cohabitation extending only from April 1861 to the month of July 1862, when the petitioner left her husband and has ever since lived apart from him. That during this period the petitioner experienced much neglect and indifference there is little doubt; that the husband's ill-conduct extended to acts of positive violence, ill-treatment, or even abusive language, there was no pretence.

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With the single exception I am about to notice, the whole of the wife's complaint falls within the category of coldness, want of affection, and at times even of proper consideration, isolation, and the like. And the question is, whether conduct of this nature, in the total absence of personal violence, or words of menace, can be pronounced legal cruelty. It is not pretended that, standing alone, it could bear that character, but it is argued that it does when taken in conjunction with the other fact, that the respondent was proved to have carried on an adulterous intercourse with a female servant in the house where he and his wife were residing; and the cases of *Popkin v. Popkin*, 1 Hagg. 768, in note; *Otway v. Otway*, 2 Phil. 96; and *Smith v. Smith*, Ib. 207, were cited. But in neither of these cases, nor in any other that I have been able to find, was a decree made on any such ground. In the first of those cases Lord Stowell spoke of the attempt to debauch servants in the house as "a strong act of cruelty," but added, "perhaps not alone sufficient to divorce, but which might weigh in conjunction with others as "an act of considerable indignity and outrage to the wife's feelings." Very cautious language this, and falling far short of an authority on which to rest a decree. In all three of these cases there was personal violence, and in the two latter the decree passed by the question of cruelty to rest on adultery plainly proved. Such being the state of the law in the Ecclesiastical Courts, it is well also to bear in mind the language of the Divorce Act. The Legislature granted to a wife the remedy of divorce in certain cases of aggravated adultery, "incestuous adultery," and "adultery coupled with bigamy," but did not add "adultery" committed in the "household." When therefore the Act speaks of "adultery coupled with cruelty," something more, it would seem, was intended than adultery alone, though of an aggravated character. In fine, it is enough to say that grave inconvenience is likely to attend an evasion of the fixed limits within which the flexible

charge of cruelty has been hitherto confined ; and as there is no authority for declaring the respondent's conduct to be legal cruelty, so as to carry a decree, I decline to make one. If the petitioner desire a decree of judicial separation on the adultery proved, the Court is prepared to pronounce a decree for judicial separation.

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*Wife's Petition for Dissolution.—Habits of Intoxication in connection with Cruelty.*

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On the question of cruelty, the Court will consider the liability of danger which the wife would incur by returning to cohabitation with a husband subject to uncontrollable fits of drunkenness, such husband having used a certain amount of violence to the wife while under the influence of drink ; and particular acts of violence will be viewed in connection with the cumulative misconduct of the married life.

This was the wife's petition for dissolution of marriage by reason of the husband's adultery and cruelty.

The petition, dated the 10th of September, 1864, alleged marriage on the 24th of July, 1862, at St. George's, Hanover Square ; cohabitation at divers places, particularly at Kenilworth, Atherstone, Rhyl and Deal ; birth of a child on the 18th of June, 1863, and that petitioner was then (at date of petition) pregnant by her husband. The petition charged adultery in Bath in November, 1863, in June, 1864, at Canterbury and Margate, and on divers occasions since the 15th of July, 1864, at Deal ; charged cruelty on divers occasions during cohabitation by abusing, threatening, assaulting, striking, knocking down, throwing things at, and otherwise treating the petitioner with cruelty ; and alleged that, in consequence of the repeated ill-treatment of the petitioner by the respondent, down to their separation on the 28th of June, 1864, the petitioner's health was materially impaired.

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July 18.POWER  
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Particulars of the cruelty were obtained on summons. The answer of the respondent need not be particularized, the question as before the Court on evidence being whether a case of cruelty was established.

The cause was heard on the 24th of June by the Court itself without a jury.

*The Queen's Advocate* (Sir R. J. Phillimore) and *Dr. Spinks* for the petitioner.

*Mr. Serjeant Ballantine* and *Dr. Swabey* for the respondent.

The evidence on the part of the petitioner was to the following effect:—The petitioner, daughter of a retired surgeon at Bath, married the respondent, who was the son of a solicitor at Atherstone, in July, 1862. They lived together without interruptions, from that time till the end of June, 1864. The respondent, who was quite a young man, had from time to time fits of drinking, over which he seemed to have no control, and during which he lost all control over himself. Several unsuccessful attempts to break him of this propensity had been made. Before and since the separation, the respondent had committed adultery with prostitutes.

As to the cruelty, the petitioner said:—After the marriage we lived first at Kenilworth, and then at Atherstone, where we remained till August, 1863. The respondent's drunkenness showed itself a few days after marriage. Soon after, he came home in the middle of the night, quite drunk; he got up early in the morning, and insisted on going to the public-house. When he came home again, he went up to his room; I followed, and found him trying to open my trinket-box with his razor. I tried to take it away from him, and struggled with him; he knocked me against the banisters outside the door. If I had not fallen against the banisters I should have fallen downstairs into a stone passage. It was a severe knock; he broke the razor in trying to open the



box. Between October, 1862, and March, 1863, he was pretty sober. In March, 1863, he went to London, and remained a week. His father fetched him home; he was not sober. He was always very bad-tempered when he was intoxicated, and sometimes used very bad language. In July, 1863, when we were in lodgings at Atherstone, he tried to cut my throat. He came home at half-past ten at night, quite drunk. I told him I should go home to my father's; he said I should not, that he would cut my throat first. He went to the side-board and took out a carving-knife, and drew the back of it across my throat; he told me he would cut my throat. I was very much frightened, but I did not show my fear. I told him the baby had not had its supper; and as soon as I had given it its supper I would return to him and have my throat cut. He was quite mad. He then let me go. I went to my room and locked the door, and I did not see him again that night. I was in serious bodily fear. I went to Derby to my father. The respondent was at Atherstone; he came over to Derby in August, 1863, and wished me to go back with him to Atherstone. I said I would if he would not drink. I started to go back that evening. He got so drunk on the journey to Atherstone, that the station-master would not let him go on, and I would not go with him. I stayed away about two months, and then went with him to his father's house. He was pretty sober for about a week. We then went to Rhyl, in Wales. I asked him to keep from drinking; he said he would if he could. I told him I could not stay with him unless he did keep from it, for he had injured my health, and since he had attempted to cut my throat, I was afraid to be with him when he was drunk. He told me he was going to get drunk again, and that he was afraid of doing me some bodily injury when he was drunk, and that I had better return to my father. I did go to my father at Bath, in October, 1863. In Bath I only saw the respondent from a window. After that I went to Deal, and in March,

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1864, my husband joined me there. I tried to live with him again : he was articled to a solicitor there, and went on pretty steadily for a time ; he then recurred to his old habits. On the 31st of May he went away. He did not tell me where he was doing ; he was not drunk when he went. On the 16th of June he came back to me with his father. His father said he was going to Bruges. He was absent from the Friday morning till the following Tuesday. He then came home to my lodgings drunk. We were then together for a week, he got sober, and then he got drunk. While we were at Deal, he boxed my ears frequently so as to hurt me.

Cross-examined :—He was not always kind to me when he was sober. I have had two children, the last born in February of this year. To the end of July, 1864, I wrote to my husband in the terms of the strongest affection. My father has not worked on my mind to institute this suit. I have not seen him during the suit. I have not been on terms with him. The estrangement between us was caused by my last return to my husband.

*Mr. Serjeant Ballantine* put in some letters of the petitioner, and addressed the Court on the point of cruelty.

*The Queen's Advocate* in reply.

*Cur. adv. vult.*

THE JUDGE ORDINARY gave the following judgment :—An earnest appeal was made to the Court by the respondent's counsel in this case to forbear pronouncing for a dissolution of the marriage. The respondent did not deny his habitual intoxication, nor the immorality with several other women charged against him by the petitioner. But stress was laid upon his youth, in the hope, often before indulged, and as often defeated, that he might reform, and become fit to cohabit with his wife. Being of opinion that the petitioner has made out her case, the Court is not at liberty to indulge in a leniency to the respondent, which would be injustice to her.

Of the adultery nothing could be said. It was frequent and undisguised, with the commonest women of the town; and had this only excuse or palliation, that the respondent was rarely or never sober. The question of cruelty was more open to discussion, and, had each act of what the law calls cruelty stood alone, there would not perhaps have been enough to found a decree. But cruelty, in the sense in which the Court holds it proved as a ground of separation or divorce, lies in the cumulative ill-conduct which the history of the married life discloses. This aggregate is made up of those acts of personal violence or degrading conduct which are spoken of in the books as "acts of cruelty," palliated or inflamed, as the case may be, by the respective language, demeanour, and bearing of the parties, and the whole considered in connection with the general treatment which the party complaining may have received. In this case it was proved that, in addition to slight blows inflicted on several occasions, and some bruises, the respondent did on one occasion really attempt to cut his wife's throat. He was drunk at the time, and he seized her and drew a large knife across her throat. She describes that the knife was turned the wrong way, and so she escaped. But it was attempted seriously, and when the respondent was in a violent passion at her proposing to leave him. It also appeared that she only escaped from the room by a stratagem, or the most fatal results might have ensued. No doubt intoxication, and not permanent ill-will or want of affection, was the cause of this attack. But the constant habit of drinking to excess continued up to the filing of the petition, and there is no guarantee that such violence might not recur. The petitioner left him more than once, only to return on reliance on his promised reformation, and only to leave again in search of safety. If this were a suit for restitution of conjugal rights instituted by the husband, how could the Court order the wife to return to cohabitation with a man thus given over to drink, and thus aggressive under

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its influence? And if it were a suit for separation by her, how could the Court refuse relief from the duty of cohabitation to a woman who, ever since her marriage with an educated, and, as his letters show, a talented man, has had her home disgraced and comfort destroyed by constant intemperance, and her name insulted by her husband's open and notorious profligacy, and her safety, if not her life, endangered by a murderous assault? If so, this conduct constitutes legal cruelty; and although the adultery would be sufficient to justify a decree of separation, and thus place the petitioner in safety without decreeing a dissolution of the marriage, still if it be legal cruelty a divorce is the right of the wife, and I am bound to decree it accordingly.

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July 4 and 25.  
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#### SIDNEY v. SIDNEY.

##### *Wife's Petition.—Dissolution of Marriage.—Permanent Maintenance.*

Where the wife obtains a decree of dissolution of marriage, the Court is inclined, so far as the circumstances of the case admit, to order the husband to secure her a permanent maintenance, on the principle, as to amount, of permanent alimony on a decree of judicial separation.

This was the wife's petition for dissolution of marriage, by reason of the husband's cruelty and adultery.

An order for alimony *pendente lite* was taken by agreement at £4 a week.

A decree *nisi* was made on the 4th of March.

On the 4th of July *Dr. Spinks* moved to make the decree absolute, and for some permanent provision for the wife under the 32nd section of the Divorce Act.

*Mr. T. H. Lewis*, for the husband, cited *Fisher v. Fisher*,

2 Swab. & Tris. 410, and contended that, as the wife had a separate income of about £150, she was not entitled to any provision from the respondent, whose income, from private and professional sources, was about £1100.

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The Judge Ordinary, acting on the principle of permanent alimony as though it had been a suit for judicial separation, directed the respondent to secure a yearly sum of £245 to the petitioner, in addition to her own income.

An intention to appeal from this order on behalf of the respondent having been intimated,

On the 25th of July the learned JUDGE ORDINARY gave the following reasons for the course he had pursued:—At the time when the Legislature was in the habit of passing Acts to dissolve marriages, it was well known that even in the case of an erring wife the husband was always expected to make some provision for the woman from whom he was about to be set free. In the Ecclesiastical Court, whenever a divorce *à mensâ et thoro* was decreed by reason of the husband's misconduct, an allowance in the shape of permanent alimony was imposed on him in his wife's favour. By the Divorce Act, the wife obtained a right in certain cases to claim a divorce, and section 32 was inserted to make this new remedy effectual by enabling the Court to order a proper provision for her. Now I am at a loss to discover any reason why the Court, in construing and applying this section, should deal with the subject in any more niggard spirit than that in which the Ecclesiastical Court regarded the question of permanent alimony. If a man, before the Divorce Act, treated his wife with cruelty and was also guilty of adultery, she could only obtain a divorce *à mensâ et thoro*, and an allowance called permanent alimony was made her, which was generally calculated at the rate of one-third of her husband's income. Since the Divorce Act, the same conduct on the part of the

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husband entitles the wife to a dissolution of her marriage; but it is hard to say that she was intended by the Legislature to purchase that remedy by a surrender to any extent of the provision to which she would otherwise have been entitled. The needs of the wife and the wrong of the husband are the same in both cases. In both cases the husband has of his own wrong and wickedness thrust forth his wife from the position of participator in his station and means. Obligated in both cases to withdraw from his home, she is, without any fault of her own, deprived of her fair and reasonable share of such necessities and comforts as lay at his command. Why should not the husband's purse be called upon to meet both cases alike? It has been said that in one case she remains a wife, and in the other she does not. This remark would carry great weight if the provision were intended to continue in the event of her second marriage; but it can hardly affect the rate of allowance made and continued so long only as the wife remains chaste and unmarried. Again, it has been said that it is not desirable that the wife should have a pecuniary interest in preferring divorce to judicial separation; but it should also be borne in mind that it is still less desirable that an adulterous husband should have a pecuniary interest in adding cruelty and desertion to his adultery, and thus evading the permanent alimony allowed on judicial separation. And this he would have if the amount of the maintenance to be accorded to his wife varied not with his misconduct, but with the form of her remedy. Further, it was urged in argument that the wife was only entitled under the section in question to a "bare maintenance," and the case of *Fisher v. Fisher*, 2 Swab. & Tris. 410, was relied upon. It is very possible that the facts of that case warranted that view; but if the expression "bare maintenance" was intended as a rule of universal application binding the discretion of the Court, I must record my dissent therefrom. A very large number of the divorce cases since the Act

have been petitions by the wife for cruelty and adultery, or desertion and adultery. And among certain classes of the community a very common case indeed is that of a young husband, who, either not agreeing with his wife or getting tired of her shortly after marriage, endeavours to shake her off. In this endeavour he generally begins by treating her with neglect and contempt, often half-starves her, often beats her, often insults her by open adultery, and ends by deserting her and cohabiting with another woman. That the wife should desire a divorce in such a case can hardly be a matter of surprise, and that she should obtain it is but bare justice. But it is the very thing that the husband wants too. He has succeeded in shaking off the obligations of marriage, and that by his own voluntary breach of them. And if he can part with his wife at the door of the Divorce Court without any obligation to support her, and with full liberty to form a new connection, his triumph over the sacred permanence of marriage will have been complete. To him marriage will have been a mere temporary arrangement, conterminous with his inclinations, and void of all lasting tie or burden. To such a man the Court may truly say with propriety, "According to your ability you must still support the woman you have first chosen and then discarded. If you are relieved from your matrimonial vows it is for the protection of the woman you have injured, and not for your own sake. And so much of the duty of a husband as consists in the maintenance of his wife may be justly kept alive and enforced upon you in favour of her whom you have driven to relinquish your name and home." If this be to give the wife a pecuniary interest in obtaining a divorce, it is also to hold a pecuniary penalty over the head of the husband for the observance of married duty. And if it be wise to repress divorce, it is still wiser to go a step higher and repress that conduct which makes divorce possible. It is the foremost duty of this Court in dispensing the remedy of divorce to uphold the institution of

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marriage. The possibility of freedom begets the desire to be set free, and the great evil of a marriage dissolved is, that it loosens the bonds of so many others. The powers of this Court will be turned to good account if, while meting out justice to the parties, such order should be taken in the matter as to stay and quench this desire and repress this evil. Those for whom shame has no dread, honourable vows no tie, and violence to the weak no sense of degradation, may still be held in check by an appeal to their love of money; and I wish to be understood that, so far as the powers conferred by the section go, no man should, in my judgment, be permitted to rid himself of his wife by ill-treatment, and at the same time escape the obligation of supporting her. I only regret that the machinery created by the statute is not entirely suited to the circumstances of those who, with a sufficient income from their labour, have yet no realized property. If it be found insufficient, it will be for the Legislature to pronounce upon the views I have just expressed, and accord or withhold amended powers. In the case in hand no difficulty arises; the respondent is proved to possess very considerable property in addition to his professional income, and to have treated his wife very brutally; and, considering the conduct of the parties, I am of opinion that the petitioner ought to be secured an annual sum from the respondent of £245, which, with her own means, will give her an income of not less than £400 a year. This sum will by no means place the same comforts at her command as she enjoyed in the position from which her husband has put her forth; but it approaches, as nearly as I have been able to calculate, the sum she would have received in the Ecclesiastical Court as permanent alimony. The decree of the Court will therefore be, that the decree *nisi* be made absolute, and that the respondent secure to the petitioner, *dum sola et casta vixerit*, the annual income of £245, and that it be referred to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper instrument or deed for this purpose, to be executed by the necessary parties.



## MILNE v. MILNE.

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MILNE

v.

MILNE.

*Citation.—Personal Service.—Practice.*

The 42nd sect. of the Divorce Act and the Rules founded thereon require personal service of the citation and copy of petition, unless the Court authorizes a substituted service, or gives the petitioner leave to proceed without service. Acceptance of service by an attorney on behalf of the respondent is not sufficient.

This was the wife's petition for dissolution of marriage. An answer on behalf of the respondent had been filed, and a replication to the answer.

*Dr. Wambey* moved for directions as to mode of trial. He called the attention of the Court to the fact that there had been no personal service of the citation and copy of petition; service of the citation had been accepted by the respondent's solicitor, and an appearance had been entered by him.

The 20 & 21 Vict. c. 85, s. 42, directs that, "Every such petition shall be served on the party to be affected thereby, either within or without her Majesty's dominions, in such manner as the Court shall, by any general or special order, from time to time direct. . . . Provided always, that the said Court may dispense with such service altogether, in case it shall seem necessary or expedient to do so."

The 4th Rule is that, "Every petitioner who files a petition and affidavit shall forthwith issue a citation to be served on the respondent in the cause according to the form No. 1."

6th Rule. "To each respondent in the cause shall be delivered, together with the citation, a copy of the petition certified under the seal of the Court."

9th Rule. "Before a party can proceed after the service of a citation, unless by the express leave of the Court, an ap-

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“pearance must have been previously entered by, or on behalf of the party cited, or an affidavit of personal service of the citation must have been filed in the Registry.”

10th Rule. “In cases where personal service cannot be effected application may be made to the Judge Ordinary, upon motion in open Court to substitute some other mode of service or to dispense with service altogether.”

The section and Rules taken together seem to intend a personal service, unless where the Court directs otherwise, though he understood that the practice had been to allow petitions to proceed on the acceptance of service by a solicitor.

*Dr. Spinks* said he believed the practice had been as stated by *Dr. Wambey*, though it seemed incorrect.

THE JUDGE ORDINARY: I think there is no warrant whatever for the practice. The Legislature intended that a respondent should be personally served. When he appears and answers, no harm is done; but in a great number of cases the respondent does not appear, and the suit might really proceed without the knowledge of the respondent upon some attorney stating that he was authorized to represent the respondent. I shall give directions to discontinue the practice for the future; but in this case, as the respondent has appeared and answered, I shall give directions as to the mode of trial.

# SUPPLEMENT TO CASES

IN THE

## COURT OF PROBATE.

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EVANS v. BURRELL.

1859.

April 13 & 20.

*Administration.—Deceased dying Abroad.—Service of Citation by Advertisement.—Jurisdiction.—Affidavit of Property in England.*

EVANS  
v.  
BURRELL.

When a wife and husband resident abroad have been served with a citation by advertisement, there should be an affidavit that neither of them has any agent in this country.

Where the party in respect of whose estate a grant is asked for died abroad, there should be an affidavit that he left personal property in England, otherwise the Court has no jurisdiction to make the grant.

Samuel Evans, late of Lancaster, in Van Diemen's Land, died on the 27th of July, 1845, at Lancaster intestate, without child or father, leaving his widow, Phoebe Evans, since married to George Burrell, his lawful mother and next of kin (since deceased), and several brothers and sisters, parties entitled in distribution. Phoebe Burrell, the widow, was with her husband resident in Australia, and had been cited by advertising an abstract of the citation in four newspapers.

*Mr. Pritchard* moved for administration to be granted to April 13. George Evans, the natural and lawful brother of the deceased, and a party entitled in distribution.

1859. SIR C. CRESSWELL: Before I grant the motion, an affidavit  
 April 13 & 20. should be filed that neither Phœbe Burrell nor her husband  
 EVANS has any agent in this country.

v.  
 BURRELL.  
 April 20.

*Mr. Pritchard* renewed motion. The required affidavit has been filed.

SIR C. CRESSWELL: It does not appear from the affidavits that the deceased left any property in this country. Unless he did so, there is nothing upon which the grant asked for would operate, and I should have no jurisdiction to decree letters of administration to be granted. If you can satisfy the registrar that the deceased left personal property in this country, you may have the grant.

1858.

In the Goods of BICKHAM SWEET ESCOT.

November 30.

*Administration.—Parties entitled Abroad.—Power of Attorney.—Section 73 of Probate Act.*

In the Goods of  
 BICKHAM  
 SWEET ESCOT.

Where the party solely entitled to the grant of administration of the estate of the deceased was abroad, and it was not known where she was or when she would return to this country, and there was a sum of money payable to the estate of the deceased, the Court made a grant of administration under the 73rd section of the Probate Act to a person whom she had duly authorized by power of attorney to manage her property in England.

Bickham Sweet Escot died November 4th, 1853, intestate, leaving his widow and an only child, Anna Escot, the sole persons entitled in distribution. The widow took out administration, and died in 1857, intestate, and Anna Escot took out administration to her estate in March, 1858, and had since left England, having executed a power of attorney, dated April 19th, 1858, in favour of V. T. Langworthy, which after

reciting that she was possessed of property, and was indebted to divers persons, and had other affairs to be settled and transacted during her absence, appointed V. T. Langworthy to execute conveyances, pay debts, and *generally* to do and perform all other acts and things which should be fitting or reasonable or necessary to be done, etc. in and about the said premises. Under the will of Mr. Impey, the deceased, at the time of his death had a vested share of a sum of money which was now payable to his estate, and amounted to £160. It was not known where Anna Escot was, or when she would return to this country.

1858.

November 30.

In the Goods of  
BICKHAM  
SWEET ESCOT.

*Dr. Deane, Q.C.*, moved for administration *de bonis non* of the effects of the deceased B. S. Escot, to be granted to V. T. Langworthy, as the lawful attorney of Anna Escot, or under the 73rd section of the Probate Act, in order that he might receive and give a discharge for the said sum.

SIR C. CRESSWELL: The terms of the power of attorney are not sufficiently extensive to constitute Mr. Langworthy the attorney of Miss Escot, for the purpose of obtaining a grant of administration to her father's estate. The words "in and about the premises," limit his power to acting with reference to the matters before specified in the power, amongst which taking out administration is not included. I think, however, I may under the power given me by the 73rd section of the Probate Act, make the grant to Mr. Langworthy.

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1863.

In the Goods of BURGESS (deceased).

May 12.

In the Goods of  
BURGESS.

*Administration.—Practice.—One of Next of Kin of full Age, but abroad.—Limited Grant to the Guardian of the others, who were Minors.—20 & 21 Vict. c. 77, s. 73.*

A. died intestate, leaving four children, of whom one was of age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the Court, under the 73rd section of 20 & 21 Vict. c. 77, granted administration to the duly elected guardian of the minors for their use and benefit, limited until one of the children should apply for a grant.

Catherine Burgess, widow, died on the 16th of March, 1863, intestate, leaving four children by three husbands. The eldest child, Edwin Green, the issue by the first husband, who was of full age, was absent from England. The other three, who were minors, of the respective ages of seventeen, fourteen, and ten years, had elected their uncle, Robert Watson, as their guardian. The value of the deceased's estate was £209.

It was necessary that an administrator should be immediately appointed, in order to get payment of a note of hand for £100, which formed part of the deceased's estate, and was just coming due, and to give notice to quit to the landlord of the house occupied by the deceased.

*Dr. Spinks* now moved the Court to grant letters of administration of the effects of the deceased to Robert Watson, the duly elected guardian of the minor children, for their use and benefit, limited until the eldest son of the deceased should apply for the grant. The uncle is willing to give justifying security.

SIR C. CRESSWELL: I am informed by the Registrar that, according to the practice of the Prerogative Court, adminis-

tration would not, under these circumstances, have been granted, limited until the eldest son should apply for the grant, because he is entitled to it at any time. The 73rd section of the 20 & 21 Vict. c. 77, however, gives me a larger jurisdiction than the Prerogative Court had, and under it I think I may make the grant to the guardian, limited until some one of the children applies for it. He must give justifying security.

1863.  
May 12.  
In the Goods of  
BURGESS.

*Motion granted.*

In the Goods of STEWART SUTHERLAND (deceased).

1862.

May 13.

*Administration Bond.—Married Woman.—Husband's  
Refusal to execute Administration Bond.*

In the Goods of  
STEWART  
SUTHERLAND.

Where a married woman is entitled to administration, and the husband refuses to join in the administration bond, or to assist his wife in obtaining the administration, the Court will grant the administration to her, allowing a third person to execute the bond for her.

The deceased Stewart Sutherland, by a will made at sea, bequeathed his property after the death of his wife to be divided equally amongst his children. Probate of this will was granted to his widow, since deceased, in 1816, and Sarah Bessel, the wife of George Bessel, was now the only surviving child of the said testator, and was entitled to one-fifth part of a sum of £811. 3s. 3d., which had been transferred to the Court of Chancery.

Sarah Bessel was living within the same house as her husband, but maintained herself by her own industry. Her solicitor applied to her husband to join her in the administration bond; this he declined to do, stating that he wanted nothing from his wife, and that she wanted nothing from him.

1862. *Dr. Spinks* moved the Court to grant to Sarah Bessel

April 29. letters of administration, with the will annexed, of the un-

In the Goods of  
STEWART  
SUTHERLAND.

administered personal estate of the deceased, and that John Mercer be allowed to execute the usual administration bond in the place of her husband.

SIR C. CRESSWELL: What use could Mrs. Bessel make of the grant when made, if her husband declined to have anything to do with the matter?

*Dr. Spinks*: The grant will enable her to apply to the Court of Chancery to settle the fund upon herself.

SIR C. CRESSWELL: In *Bubbers v. Harby*, 3 Cur. 50, Sir H. Jenner refused to grant letters of administration, with the will annexed, to the attorney of a married woman upon her proxy alone, her husband refusing to join in the proxy. When the husband is abroad, another person has been allowed to execute the bond. The practice in the Registry in such a case as this is to require a certificate to be filed from the proctor or solicitor of the wife, to the effect that the wife can act under the letters of administration, if granted, without the consent of the husband; and, she must understand that if, after all, they turn out to be inoperative, they cannot be revoked. At present there is no evidence before the Court of the husband's refusal to execute the bond. The case must stand over.

May 13. *Dr. Spinks* renewed the motion upon a further affidavit of the husband's refusal, and a certificate that the wife would be enabled to administer the estate, if the grant were made.

SIR C. CRESSWELL: Since the previous motion day, an exact precedent has been found for making such a grant. In the year 1839, in the case of *Wookey v. Appleby* (not



reported) Sir H. Jenner allowed a bond to be given by the nominee of a wife in the place of her husband, he being in England at the time, and refusing to concur in assenting to the application. I will therefore grant the motion as prayed.

1862.

May 13.

In the Goods of  
STEWART  
SUTHERLAND.

May 20.

SIR C. CRESSWELL: The attention of the Registrar has been called to the case *In the Goods of Jaques*, 5 N. of Cas. 294, decided by Sir H. Jenner in 1849, as inconsistent with *Wookey v. Appleby*. There a married woman was willing to take out letters of administration to a child by a former husband, but as she could not procure the execution of the bond by her second husband, who had separated from her, and the place of whose residence she could not ascertain, she was willing to take the grant, provided the Court would accept a bond executed by an additional surety in the place of her husband, or to be passed over, and to allow the grant to go to a sister of the deceased. There the same learned Judge avoided giving a decision on the point now raised, but was willing to accept her renunciation and make the grant to the sister after the husband had been cited. He said, "There must be a decree against the husband. The wife cannot abandon his rights without his consent, or without giving him the means of knowing, so as to enable the Court to decree administration in his absence. It is an unfortunate case, but still the practice of the Court must be observed. I must reject the motion." The husband was afterwards cited, and did not appear, and administration was granted to the sister. It does not appear from the report that the question, whether the wife could take administration, giving a bond other than that of her husband, was raised. I mention this, that there may not be any misapprehension hereafter.

1859.

March 9.

In the Goods of GEORGE STREAKER (deceased).

In the Goods of  
GEORGE  
STREAKER.

*Probate.—Will made before January, 1838.—Unattested  
Alterations.—Presumption of Date of Alterations.*

Unattested alterations appearing in a Will executed prior to the Wills Act (1 Vict. c. 26) coming into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the Act came into operation, and are therefore entitled to probate.

George Streaker died on the 24th of August, 1855, leaving a will, dated the 12th of January, 1831, signed by him and attested by three witnesses, of which he appointed his wife, Elizabeth Streaker, sole executrix and residuary legatee. Elizabeth Streaker died in 1858 without having proved the will, which had been found by her executors amongst some of her papers. In the body of the will there was a legacy of three hundred guineas to the Leeds Infirmary; a line had been drawn through the words "three hundred guineas," and in the margin of the will there were, in the handwriting of the deceased, these words, "£200 to be paid out of my property "after my decease," and there were similar alterations lower down the will, but there was no evidence to show whether the alterations made before or after 1 Vict. c. 26, came into operation. Two of the attesting witnesses deposed that inquiries had been made without avail to ascertain when the cancellations and the additions in the margin had been made.

February 23.

*Dr. Spinks* moved for administration of the effects of George Streaker, with the will annexed, to be granted to the executors of his widow, as the residuary legatee of the deceased, with the alterations appearing in the margin of the will as parts thereof. In the absence of evidence as to the time when the alterations were made, it must be presumed that they were made before the Wills Act came into operation.

*In the Goods of Pennington*, 1 N. of Cas. 399; *Pechell v. Jenkinson*, 2 Curt. 273. In the latter case the deceased died in January, 1839, leaving a will made before the Wills Act, and an unattested codicil without date. There were no circumstances to show at what time the codicil was made, yet Sir H. Jenner pronounced for it, saying:—

“Is a Court to hold, that because a paper is without date, it was written after the 1st of January, 1838, and consequently being unattested, is to fall under the new law? Is not the Court rather to be astute in finding means to carry into effect the intentions of the testator? I am of opinion that where a case is bare of circumstances like the present, and the deceased was as likely to do what she has done before as after the 1st of January, 1838, the presumption should rather be, that it was done before that time.” There is nothing here to lead to a contrary conclusion. Every person is presumed to know the law, and where a codicil is written without date, but signed by the deceased, the Court would, in the absence of circumstances tending to a contrary conclusion, be bound to presume that it had been executed according to the law as it stood at the time it was written.

1859.

March 9.

—  
In the Goods of  
GEORGE  
STREAKER.

SIR C. CRESSWELL: Those are certainly authorities in point, though the reasoning in the latter case does not seem to me perfectly satisfactory. The motion must stand over for further affidavits.

*Dr. Spinks* renewed the motion. He referred, in addition March 2. to the authorities previously cited, to rule 26. This rule, which applies to wills made before the 1st of January, 1838, is as follows:—“Alterations and interlineations made by the testator, if unattested, are to be proved by an affidavit of two persons to his handwriting. . . . Proof by affidavit that they existed in the paper at the time it was found in

1859. "the repositories of the testator recently after his death,  
 March 9. "may, under circumstances, suffice. Alterations and inter-  
 In the Goods of "lineations made since the 31st of December, 1837, are sub-  
 GEORGE "ject to the provisions of 1 Vict. c. 26." That rule seems to  
 STREAKER. be founded on the cases cited. *Cur. adv. vult.*

SIR C. CRESSWELL: The question raised in this case was, whether certain unattested cancellations in the body of the will, and certain additions made in the margin of the will of the deceased George Streaker, and in his handwriting, were made before or after the Wills Act, 1 Vict. c. 26, came into operation, there being no evidence as to the time at which they were made. Dr. Spinks referred to two cases as authorities to show that, under such circumstances, the presumption would be that the alterations were made before the Wills Act came into operation. The reasoning on which these decisions were founded is not to my mind quite satisfactory, but they are certainly authorities in favour of the existence of such presumption; and I also find this presumption recognized in the arguments of counsel on both sides in *Cooper v. Bockett*, 6 Moo. P. C. 419, before the Judicial Committee of the Privy Council, as an established rule of law. I shall, therefore, decree administration, with the will annexed, with the alterations in the margin as part thereof.

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(Before SIR C. CRESSWELL.)

1860.  
 January 11. In the Goods of WILLIAM FAIRLIE CUNNINGHAM (deceased).  
 In the Goods of WILLIAM  
 FAIRLIE  
 CUNNINGHAM. *Probate.—Re-execution.—Attestation.*

A testator having made some alterations in a duly-executed Will, he and the attesting witnesses traced their former signatures with a

dry pen, and the attesting witnesses placed their initials in the margin opposite each of the alterations.

The Court refused to regard the initials in the margin as evidence that the alterations had been duly executed and attested, and declined to grant probate of the Will with alterations.

1860.

January 11.

—  
In the Goods of  
WILLIAM  
FAIRLIE  
CUNNINGHAM.

William Fairlie Cunningham, formerly of Brompton and of Chiswick, died on the 13th of June, 1859, leaving a will, which had been duly executed on the 2nd of April, 1859. After the execution, it was discovered that the Christian names of his brother and sister were incorrectly spelt in the will, and also that an error had been made in the Christian name of one of the executors. The testator sent back the will to his solicitor to make the necessary corrections, and on the 7th of April the will was returned to him, and he re-executed it, as he supposed, by tracing over his former signature with a dry pen, in the presence of the two attesting witnesses. The attesting witnesses also traced over their former signatures with a dry pen. Opposite the alterations, in the margin, there were the initials of the attesting witnesses.

*Dr. Wambey* moved for probate of the will with the alterations, and submitted that, although the tracing of the signatures with a dry pen by the attesting witnesses did not amount to a re-execution or a re-attestation, yet the initials of the attesting witnesses opposite the alterations was evidence from which the Court might infer that the testator had acknowledged his signature to the will so altered, in the presence of the persons whose initials were appended to the alterations.

SIR C. CRESSWELL: The initials were not written there *animo attestandi*.

*Dr. Wambey*: They were written *animo attestandi* as to the alterations.

1860. SIR C. CRESSWELL: But not as to the testator's signature.

January 11. Mere initials in the margin would not be sufficient as an

In the Goods of  
WILLIAM  
FAIRLIE  
CUNNINGHAM.

attestation to a testator's signature without an attestation clause at the end. It is clear they were not put there *animo attestandi*. It cannot be too well understood that tracing with a dry pen is not equivalent to a signature.

*Motion refused.*

1860.

WYMAN v. ASHWELL.

March 21.

WYMAN  
v.  
ASHWELL.

*Will affecting Real Estate.—Bastard.—Citing Queen's Proctor.—Section 61 of Probate Act.*

When the Will of a bastard affecting real estate is propounded, if such real estate would devolve on the Crown in case of an intestacy, the Queen's Proctor may be cited to intervene in respect of the real estate.

The plaintiff propounded the will of Annie Miller, a bastard, dated July 23, 1858, affecting real estate. The defendant alleged the revocation of this will by a subsequent will dated September 19, 1858. The plaintiff by his replication denied the validity of the later will.

*Dr. Waddilove*, for the plaintiff, moved for an order to cite the Queen's Proctor, under section 61 of the Probate Act and rule 34, on an affidavit, that if the deceased died intestate, her real estate would devolve upon the Crown, etc.

SIR C. CRESSWELL granted the motion.

EMBERLEY *v.* TREVANION.

1860.

March 21.

*Will.—Same Person Legatee and Devisee.—Will propounded by her as Legatee only.—Cited as Devisee.—Sections 61 and 63 of Probate Act.*

EMBERLEY  
*v.*  
TREVANION.

Where the same person was a legatee and devisee under a Will, and propounded the Will in her character of legatee only, the Court allowed her to be cited to see proceedings as devisee.

The plaintiff propounded a will disposing of real and personal property as a legatee, being also a devisee under it. She had not appeared as devisee. The defendant, who was next of kin and heir-at-law, had appeared and opposed the will as next of kin.

*Dr. Tristram*, for the defendant, moved under section 61 of the Probate Act, for a citation to issue to the plaintiff to see proceedings as devisee. By section 63, the probate is only to bind a person interested in real estate, where such person has been cited or made a party to the proceedings. A question might be raised hereafter, whether a person who only appears, as the plaintiff has done, in his character of legatee, can be said to have been cited or made a party to the proceedings in respect of real estate.

*Dr. Spinks* for the plaintiff.

SIR C. CRESSWELL: It is plain that the object of the statute was to prevent the trial of the same question twice over; once in a Common Law Court, when it affected real property, and a second time in this Court, when it also affected personal property. I have always been of opinion that if parties are before the Court in a suit, in whatever capacity, and take part in the litigation, they are bound by the decision

1860.  
March 21.  
—  
EMBERLEY  
v.  
TREVANION.

in that suit, and that the practice of issuing a separate citation to parties as heirs-at-law who have already appeared as next of kin, is a work of supererogation. But if Dr. Tristram likes to issue the citation, there is no objection to his doing so.

*Dr. Spinks* asked whether it would be necessary to cite the plaintiff to appear as heir-at-law.

SIR C. CRESSWELL: You must do as you think proper.

*Motion granted.*

1860.  
November 21.  
—  
ANDREWS  
v.  
MURPHY.

ANDREWS v. MURPHY.

*Administration to a Creditor.—Substitution of one Creditor for another.—Costs.—Practice.*

The Court will make a grant of administration to a creditor who has been substituted for the creditor who extracted the citation, and will allow the latter such costs as he necessarily incurred prior to the former one taking up the application.

F. J. Murphy died June 17, 1860, intestate, leaving personal estate of the value of £1400. The deceased died indebted to the plaintiff, S. Sturgis, and other creditors. The plaintiff extracted the usual citation from the Registry, which he served on the next of kin of the deceased. No appearance had been entered by or for them, but on October 16, 1860, S. Sturgis entered an appearance, it having being agreed amongst the creditors that he should apply for administration instead of the plaintiff, and that the costs incurred by the plaintiff should be paid by S. Sturgis as administrator.

*Mr. Pritchard* moved for the grant to be made to S. Sturgis. By the practice of the Prerogative Court, another



creditor might be substituted for the creditor who had extracted the citation.

1860.

November 21.

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ANDREWS  
v.  
MURPHY.

*Dr. Swabey*, for the plaintiff, consented, provided S. Sturgis entered into a bond to pay the debts *pro rata* according to degree; and also that the plaintiff's costs should be taxed as between attorney and client, and be the first charge on the estate.

SIR C. CRESSWELL: The grant may be made to Sturgis. The plaintiff may have such costs as were necessarily incurred by him prior to the application of Sturgis,—such costs as would have been allowed to Sturgis if he had originally commenced proceedings. I cannot order them to be taxed as between attorney and client. Such was not the practice of the Prerogative Court.

*Dr. Swabey* asked that the plaintiff might have the costs of his appearance on this motion.

SIR C. CRESSWELL: The costs of his appearance to-day ought not to be allowed.

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BOSTON v. FOX.

1860.

January 13.

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*Proof in Solemn Form.—Costs.—Executor of Previous Will.*

An executor of a former Will has the same right as a next of kin to put an executor of a later Will upon proof in solemn form, and to interrogate his witnesses.

BOSTON  
v.  
FOX.

This was a business of proving in solemn form the will of the late Mrs. Lucy Braham. The will was propounded by the plaintiff as executor, and the defendant who called for proof in

1860. solemn form was the executor of a previous will. The testatrix  
 January 13. was a markswoman, and duly executed a will on the 8th of  
 Boston November, 1857. The will of which the defendant was exe-  
 v. cutor, was executed in 1849.  
 Fox.

The attesting witnesses were examined and cross-examined, but no witnesses were produced by the defendant.

*Mr. H. James* for the plaintiff.

*Mr. D. Keane*, for the defendant, said that he had waited for six months after the death of the testatrix, and then, no other will being propounded, he had produced the will of 1849. The plaintiff then propounded the will of 1857, and the defendant had a right, under the circumstances, to call upon him to prove it.

SIR C. CRESSWELL: I rather think that the privilege of a next of kin of putting an executor to proof in solemn form is not extended to the executor of a previous will.

*Mr. D. Keane* referred to Coote's Probate Practice, 207 *gg*.  
 "By the practice of the Prerogative Courts, next of kin, an  
 "executor of a former will, and a creditor or other person in  
 "possession of administration, were permitted, *before probate*  
 "*had been granted in common form*, to put an executor on  
 "proof of a will without being liable for costs, provided they  
 "did not do so vexatiously, or did not plead or attempt to  
 "set up in the interrogatories, a case of fraud or conspiracy  
 "which the evidence did not justify them in doing."  
 The authority cited for this proposition as to executors of former wills, was *Mansfield v. Shaw*, 3 Phill. 22. Sir John Nicholl, in that case, said, "The law gave him" (the executor under a former will) "the right to call upon the executor  
 "to propound his will in solemn form of law, and to interro-  
 "gate the witnesses."

SIR C. CRESSWELL: That is certainly a dictum that an executor, under a former will, has a right to call for proof in solemn form, of a subsequent will. I therefore decree probate without costs.

*Probate without costs.*

1860.  
January 13.  
BOSTON  
v.  
FOX.

FOALE v. TRETHEWY AND BROWN.

*Earlier and later Wills.—Executors —Costs.*

1863.  
May 27 and  
June 9.

Where the executors of an earlier Will, being disinterested persons, opposed on reasonable grounds a Will of later date, and the verdict of the jury established the later Will, the executors of the earlier Will were held to be entitled to their costs out of the estate of the deceased.

FOALE  
v.  
TRETHEWY  
AND BROWN.

This was a question as to costs. The plaintiff, as executor, propounded a will made in 1862: the defendants, as executors of a former will dated 1858, pleaded undue execution, incapacity, and not the will of the deceased; also that deceased duly executed his last will in 1858. Issues on these pleas were tried before Byles, J., at the assizes at Exeter, and a verdict found for the plaintiff on all issues as to the will of 1862.

As to the will of 1858, the verdict of the jury was in favour of the defendants.

*Mr. Collier, Q.C.*, now moved for probate of the will of 1862, and for costs against the defendants.

*Dr. Wambey*, for the defendants, submitted it was a case in which so far from being condemned in costs, they should have their costs out of the estate; they had no interest themselves in the will of 1858, and, in resisting the latter will, merely discharged their duties to the legatees under the will of 1858. The notes of the learned judge who tried the cause may show that there was considerable evidence of incapacity.

1863.

May 27 and  
June 9.  
June 11.

SIR C. CRESWELL: I must communicate with my brother Byles, who tried this case.

*Cur. adv. vult.*

FOALE  
v.

TRETHEWY  
AND  
BROWN.

SIR C. CRESWELL: I am informed by my brother Byles that he considered the verdict a right one, but that there was ample ground for disputing the will. That being so, and the defendants disinterested persons, I think their costs ought to be allowed out of the estate.

1863.

May 28.

OWEN  
v.

WILLIAMS.

OWEN *v.* WILLIAMS.

*Evidence.—Attesting Witnesses, Examination of.—Practice.*

Where the party propounding a Will in a contested suit, the only issue being due execution, and notice under the 41st rule having been given, called one of the attesting witnesses, who gave evidence against the due execution, the Court held that he was bound to call the other attesting witness.

The plaintiff in this case had called in the probate of the will of Hugh Jones, late of Dolgelly, and prayed that it might be revoked.

The defendant having propounded the will as executor thereof, the plaintiff pleaded that it was not duly executed, and gave notice under rule 41 of Rules for Contentious Business that he merely insisted upon having it proved in solemn form, and did not intend to call evidence.

The case came on for trial before Sir C. Cresswell, without a jury.

*Mr. Collier, Q.C., and Dr. Spinks* for the executor.

*Mr. O'Malley, Q.C., and Mr. R. E. Turner* for the party opposing the will.

One of the attesting witnesses, Hugh Jones, was examined on behalf of the executor, and his evidence was, that the will was not duly executed. Evidence was given to contradict him, but the other attesting witness was not called.

1863.  
May 28.  
OWEN  
v.  
WILLIAMS.

At the close of the defendant's case,

*Mr. O'Malley* asked for leave to call the other attesting witness, notwithstanding the notice which had been given by the defendant.

SIR C. CRESSWELL: You are certainly at liberty to call him.

The hearing was then adjourned. When it was resumed, May 28.

SIR C. CRESSWELL said he had been considering the question, and he was of opinion that the executor propounding the will was, in these circumstances, bound to call the other attesting witness.

The other attesting witness, Hugh Owen, was accordingly called on behalf of the executor, and he also gave evidence against the will

The Court did not credit the evidence of the attesting witnesses, but pronounced for the will, and ordered probate to be delivered out to the defendant. It refused to make any order as to costs.

1861.

In the Goods of MICHAEL WINTER (deceased).

January 16.

*Will of Foreign Property.—Will of English Property.—  
Probate.*In the Goods of  
MICHAEL  
WINTER.

A testator dying domiciled in England, having made two Wills in England, one relating exclusively to property in Peru, and the other to property in England, and appointing executors of both Wills: Held, that the executor of the English Will, who was also one of the executors of the Peru Will, was entitled to probate of both instruments in this Court.

Michael Winter, formerly of Peru, died at Bayswater, December 20th, 1860. He left two wills. The first will, which was dated June 9th, 1860, began thus:—"In this, my first "and only will, as relates to my property in Lima, Peru, the "state of which is as follows." He then disposed of this property, and appointed executors of this will, but it contained no residuary clause. The second will, which was dated June 12th, 1860, commenced thus:—"This is the last will of me, "Michael Winter, of Bayswater, in the county of Middlesex, "formerly resident in Peru, and now domiciled in and intend- "ing to remain in England, relative to my property other "than that in the State of Peru." It then proceeded to dispose of his property in England, and to appoint executors and trustees, and contained a general residuary clause.

*Dr. Phillimore* moved for probate of the first as well as of the second will, in order that the opinion of a Court of Construction might be taken on them. The deceased being domiciled in England at the time of his making the wills and of his death, the Court had jurisdiction over his personal property wherever situated.

SIR C. CRESSWELL: You have not cited me any instance of an instrument having been included in probate which in terms deals with property not within the jurisdiction of this Court.

I think, however, that *Spratt v. Harris*, 4 Hagg. 405, is an authority upon this point. As the gentleman on behalf of whom you apply is entitled as executor under both documents, I shall decree a grant to him of probate of both. I do not exclude any other executor. Any of them may make such applications as he may think fit. I find that when a testator has left general executors and a limited executor, the practice has been to grant probate to each of them according to the terms of his appointment. I do not quite see the principle upon which that practice has obtained.

*Probate granted of both instruments.*

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DICKINSON v. SWATMAN.

*Dependent Relative Revocation.—Will.*

1860.

July 30.

DICKINSON  
v.  
SWATMAN.

The Court will not apply the doctrine of dependent relative revocation to a case where the deceased has destroyed a Will through a mistaken notion of the legal effect of its destruction, if it is satisfied that he intended entirely to revoke that Will.<sup>1</sup>

William Dickinson, the deceased in this case, died on the 1st of May, 1860. The plaintiff, Rebecca Dickinson, as executor, propounded a will, dated April 28th, 1826. The defendant, pleaded, amongst other pleas, the revocation of this will by a later will, dated July 14th, 1851. The plaintiff replied that, after the execution of the last will, the deceased revoked the same by tearing and burning it when of sound mind. Issue joined.

The cause came on for hearing before the Court itself.

<sup>1</sup> Overruled. See *Powell v. Powell*, 1 L. Rep. (P. & M.) 209.

1860.

July 30.

DICKINSON

v.

SWATMAN.

*Dr. Deane, Q.C., and Mr. Douglas Brown* for the plaintiff.

*Dr. Phillimore, Q.C., and Mr. Mandell* for the defendant.

The plaintiff took the deceased's property absolutely under the first will, and only an interest in it during her widowhood under the second will.

There were two witnesses examined. Istly. John Valentine, who deposed as follows:—"I knew William Dickinson for several years. I saw him some time before Michaelmas, 1859. He told me he had made a will in 1851 in Swatman's office, and that he did not intend that this will should stand good, because the parties in whose favour he had made it were very troublesome to him, always wanting money, and that if they got his money they would squander it. I saw him then burn a document which looked like a will, saying at the same time, 'There is a will I made a long time ago that will do for my mistress. I shall leave her my sole executrix.' He had several conversations with me about the will before he destroyed it. Jane Barton came in at the time he destroyed the will. He gave it to her, and said, 'Mr. Swatman charged me one guinea for it.' I was in his house shortly before he died. He gave his wife a will, and said, 'You will want this if I depart this life. This is the will you are to go by.'" On cross-examination: "In substance, the deceased said he destroyed the will of 1851 that the will of 1826 might stand." 2ndly. Jane Barton, who deposed as follows:—"I knew the deceased, William Dickinson. I was at his house at Michaelmas, 1859. I saw him and the last witness at his house. They were looking over some papers. The deceased took up a paper consisting of two or three sheets. He said he should burn it. He tore it in a dozen pieces. He talked about another will. He said, 'I have another will, which I made many years ago, of which my mistress is executrix; she is to go by it.' I lived with



“ him for the last six months of his life. About a month before  
 “ he died he gave his wife a will (will of 1826), and said,  
 “ ‘ Mistress, this is what you will have to go by.’ ”

1860.

July 30.

DICKINSON

v.

SWATMAN.

*Dr. Deane*: To establish the will of 1826, I might contend that this will, having been executed before the Wills Act, is not governed by the rule introduced by that Act as to the revival of a revoked will, but by the old law, and that it has since its revocation been republished by the declarations of the deceased. But I can cite no authority in support of this proposition. The only authority is the other way. The result will be an intestacy.

*Dr. Phillimore*: The will of 1851 was destroyed under the erroneous impression that the will of 1826 was thereby revived. The destruction of the will could not have that effect, but the facts raise this curious question, namely, whether this is not a case of dependent relative revocation. (1 Wms. on Exors., 120, and *Onion v. Tyrer*, 1 P. Wms., 345.) If so, the defendant will be entitled to probate of a copy of the will.

SIR C. CRESSWELL: To make this a case of dependent relative revocation, you must introduce the ingredient that the deceased intended that, unless the will of 1826 stood, the will of 1851 was to stand. If he intended to make a new will, the doctrine would not apply. This question may also be suggested, namely, whether he would rather have no will at all than the will of 1851. Is there any case in which the doctrine of dependent relative revocation has been applied where the act of cancellation has been done with reference to a bygone act, where a new will duly executed has been destroyed with a desire to set up an old will?

*Dr. Phillimore*: I can cite no authority. The principle is laid down in *Hine v. Thason*.

1860.  
July 30.

DICKINSON  
v.  
SWATMAN.

SIR C. CRESSWELL: I am clearly of opinion that the deceased intended entirely to revoke the will of 1851. The will of 1826 was not the last will of the deceased, and that of 1851 was revoked. It is a proper case for costs to come out of the estate.  
*Intestacy pronounced for.*

1859.  
July 27.

DAVIS  
v.  
DAVIS.

DAVIS v. DAVIS.

*Probate of Copy of Will.—Executor cited.—Non-appearance.*  
—21 & 22 Vict. c. 95, s. 16.

An executor who has been cited to take probate of a missing Will, and has not appeared to such citation, is barred from taking probate of the original Will, when found.

Lydia Davis died in 1857. In 1850 she duly executed a will, whereof she appointed the plaintiff sole executor. After her death the will could not be found; and in December, 1858, a citation was issued and served upon the plaintiff, calling upon him to take probate of a copy of the will. No appearance was entered by him; and in April, 1859, letters of administration, with a copy of the said will annexed, were granted to Ann Davis, the defendant. The original will had since been found, and brought into the registry.

*Dr. Spinks* moved for probate of the original will to be granted to the plaintiff, the executor. The executor in this case was not cited to take probate of the will, but only of a *copy* of the will. The 16th section of 21 & 22 Vict. c. 95, only bars an executor from his right to probate, who, when cited to take probate of a will, does not appear. This section therefore does not apply.

*Dr. Phillimore, Q.C., contra.*

SIR C. CRESSWELL: Upon the true construction of this section, the plaintiff is not now entitled to probate. He was the executor named in the will of the deceased; he was cited to take probate, and did not appear to such citation. His right to ask for probate, therefore, has wholly ceased. Although probate may be granted of a copy of a will, it is still probate of the will of the testator, and the executor must place faith in the Court that it will only grant probate of what is proved to be the will. Whether it is a copy or not is a matter for the Court. I reject the motion, with costs.

1859.  
July 27.

DAVIS  
v.  
DAVIS.

In the Goods of JOHN HUGHES (deceased).

1860.  
July 16.

*Chain of Executorship.—Power.—Married Woman.*

The chain of executorship is not continued by the appointment of an executor by a married woman in a Will made under a power.

In the Goods of  
JOHN HUGHES.

John Hughes died, having appointed by his will his wife Phœbe sole executrix, and his nephew, John Smith, residuary legatee. Phœbe proved the will in 1843, and afterwards married William Griffiths. Upon her second marriage, certain property was settled to her separate use, with a power of appointment over it by will. In 1857 she executed a will in pursuance of such power of appointment, and therein named two executors, and died. In October, 1858, this will was proved by one of her executors, power being reserved to the other executor. Her husband, William Griffiths, took out a *cæterorum* grant to her estate.

*Dr. Spinks* moved for administration *de bonis non* of the effects of John Hughes, with his said will annexed, to be granted to John Smith, as residuary legatee, without citing

1860.  
July 16.

In the Goods of  
JOHN HUGHES.

the executors of Mrs. Griffiths's will. He submitted that they had no interest, and therefore need not be cited. According to the practice in the Registry, the chain of an executorship is not continued by the appointment of executors to a will made under a power.

SIR C. CRESSWELL: I should think it was not. In *Tugman v. Hopkins* (4 M. & G. 400) Chief-Justice Tindal said that the executors of the will of a married woman made under a power took nothing *jure representationis*; but that they took under the person that gave the power, but not under the testatrix. Administration may go to the residuary legatee as prayed.

1859.  
Nov. 23.

YOUNG and  
Another v.  
FERRIE and  
Others.

YOUNG and Another v. FERRIE and Others.

*Probate Act 20 & 21 Vict. c. 77, ss. 61 and 63.—Heir-at-law.  
—Caveat.—Declaration.—Costs.*

An heir-at-law who has not been cited, cannot, by entering a caveat, prevent the executors of a Will affecting realty from obtaining probate in common form. If the heir-at-law has entered a caveat under those circumstances, it is not necessary for the executors to declare.

The plaintiffs were the executors of the late Miss Elgar, and they were proceeding to prove her will in common form, when a caveat was entered by the heir-at-law, although he had not been cited. The executors thereupon filed a declaration, but the heir-at-law did not plead.

*Mr. Honeyman*, for the executors, now moved for probate, and that the heir-at-law might be condemned in costs.

*Mr. Hannen*, for the heir-at-law, opposed the motion as to costs. The heir-at-law had done nothing beyond putting the

executors to prove the will, and he had a right to do so, as it affected the real estate. 1859.  
Nov. 23.

SIR C. CRESSWELL: The heir-at-law had no right to intervene without being cited, because the executors were proceeding to prove in common form, not in solemn form, and the probate would not have affected him as he had not been cited (20 & 21 Vict. c. 77, ss. 61 and 63). But it was unnecessary for the executors to declare, because they knew from the appearance entered that it was the caveat of the heir-at-law, and they might have proceeded to obtain probate. I cannot therefore condemn the heir-at-law in the costs of the declaration. Probate will be granted upon the proper affidavits as to the due execution being brought into the Registry. There will be no order as to costs.

YOUNG and  
Another v.  
FERRIE and  
Others.

In the Goods of MARY ANN E. STEWART (deceased).

1863.  
March 17.

*Incorporation.—Schedule written subsequent to Execution of Will, but prior to Execution of Codicil.—Probate.*

In the Goods of  
MARY ANN E.  
STEWART.

A testatrix having directed her executors in her Will to distribute certain articles according to any list or lists signed by her, and having, prior to the execution of a second codicil, signed a list to which no reference was made in the second codicil, the Court, upon the authority of the case *In the Goods of Hunt*,\* allowed the list to be included in the probate.

Mary Ann E. Stewart died January 6, 1863, leaving a will dated May 24, 1861, and two codicils, dated respectively September 23, 1861, and November 29, 1862, of which she appointed the Reverend C. Smyth and C. Stewart executors. In the will there was the following clause:—"I direct my

\* 2 Roberts, 622.

1863.

March 17.

In the Goods of  
MARY ANN E.  
STEWART.

“ executors to distribute to the parties whose names may be inscribed upon the same such packets as I may leave for that purpose, and also all pictures, books, and other articles according to any list or lists signed by me.” This clause was inserted in the will on the suggestion of Mr. C. Stewart, in consequence of the deceased expressing to him that she felt a difficulty how to dispose of certain articles, and thereupon he suggested that a list should be prepared by her from time to time as she made up her mind to dispose of them. After her death he found the paper E amongst her papers, which had been written by him and signed by the deceased after the execution of the will, but before the execution of the second codicil. It commenced “List referred to in my will and codicils. ‘ I give and bequeath,’ ” etc. The second codicil contained this clause : “ I hereby confirm my said last will and testament, and all the codicils thereto signed by me, except,” etc. It did not appear that the deceased had made more codicils than the two found.

*Dr. Middleton* moved for probate of the will, the two codicils, and the list marked E. He cited *In the Goods of Hunt*, 2 Roberts, 622. In that case the deceased bequeathed certain articles of plate “specified in schedules A and B to be annexed to this document.” Two schedules marked A and B were found, which were written after the execution of the will, but before that of the codicil, but were not referred to in the codicil. Sir John Dodson granted probate of the two schedules, with the will and codicil.

SIR C. CRESSWELL : I think the decision of Sir John Dodson which you have cited is sufficient to authorize me in including the paper E in the probate. But for that decision, I should have considered it doubtful whether I ought to have granted your motion. *Probate granted as prayed.*

In the Goods of DAVID DAVIS (deceased).

1860.  
January 18.

*Intermeddling with the Estate by Administrator.—Administration with Will annexed.*

In the Goods of  
DAVID DAVIS.

An administrator with the Will annexed cannot be forced to take out administration with a later Will annexed, when the first administration is revoked, although he has intermeddled with the estate.

David Davis died on the 26th of April, 1854, and administration with the will annexed was granted to Eleanor Morgan. The will was dated June, 1841, but after that grant a later will was discovered, dated July, 1849. The administratrix had been cited to bring in the letters of administration of the will of 1841 from the Caermarthen registry, and she had done so, but she refused to take out administration with the will of 1849 annexed.

*Dr. Spinks*, at the instance of two devisees under the will of 1849, moved for a citation calling on her to take out administration with that will annexed, on the ground that she had intermeddled with the estate.

SIR C. CRESSWELL: There are two difficulties in your way. Your clients are merely devisees of real estate; they have no interest in the personal estate.

The other difficulty is, that there is no instance to be found in which an administrator has been compelled to take a grant. An executor who has intermeddled can be compelled to take probate, but an administrator who has intermeddled cannot be compelled to take a grant.

*Motion refused.*

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1860.

December 5.

In the Goods of HANNAH JOYS.

In the Goods of HANNAH JOYS. *Wills made under different Powers by a Married Woman.—  
Effect of general Revocatory Clause in later Will.*

A *feme covert* made two Wills during different covertures, the one in 1848 under one power, and the other in 1857 under another power. The latter Will contained a general revocatory clause, but did not refer to the previous Will or to the power under which it was made. Held that the Will of 1848 was entitled to probate.

Hannah Joys, the deceased in this case, was twice married. By the will of her first husband, C. Campbell, she had a power of appointment by will over certain property, and by a will dated the 24th of July, 1848, she appointed such property to the said John Joys, her then husband, but named no executor.

On the 3rd of March, 1857, she executed a will appointing certain property to the said John Joys over which she had a power of appointment, under the settlement made on her marriage with him, and named John Joys her executor. The dispositions of this will were limited to the property contained in the settlement, but it contained a general revocatory clause.

Probate of the will of the 3rd of March, 1857, had been granted by the Consistory Court of Chester on the 25th of August, 1857.

*Mr. A. Bailey* moved the Court to revoke this grant, and to decree administration with the two wills annexed, as together containing the last will of the deceased; inasmuch as the last will contained no reference to the former will, or to the power creating it, it was not revoked by the general revocatory clause contained in the last will.

*In the Goods of Merritt*, 1 Swab. & Tris. 112.

*In the Goods of Meredith*, 29 L. J. P. & M. 155.



SIR C. CRESSWELL: I am of opinion that the will of the 1860.  
 24th of July, 1848, was not revoked by the later will. The December 5.  
 probate granted by the Chester Court of the will of 1847 will  
 therefore be revoked, and letters of administration with the <sup>In the Goods of</sup>  
 two wills annexed will be granted, and also a *cæterorum* grant. HANNAH JOYS.

The decree made was as follows:—"Administration with  
 "the wills bearing date the 24th of July, 1848, and the 3rd  
 "of March, 1857, as together containing the last will and  
 "testament of the deceased annexed, of the personal estate  
 "and effects of the said deceased to be committed and granted  
 "to John Joys, the lawful husband of the said deceased, and  
 "the sole person entitled to her personal estate and effects,  
 "over which she had no disposing power, and concerning  
 "which she is dead intestate, and revoked the probate of the  
 "will dated the 3rd of March, 1857."

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In the Goods of ELEANORA REAY (deceased).

1862.

June 17.

*Married Woman.—Will.—General Grant of Letters of Admin- In the Goods of*  
*istration, with Will annexed, to the Executors of a Married ELEANOR*  
*Woman.—Revocation of previous Limited Grant.* REAY.

Where a married woman who, with her husband's consent, had made investments in her own name, and had made a Will in his life disposing of property over which she had a power of appointment, and of all her other property, and her husband had, in writing, consented to and approved of the said Will, and the wife died in the husband's lifetime,—the Court revoked a limited grant made to the wife's executors, and decreed a general grant of administration with the Will annexed to them, upon the consent of the personal representative of the husband to such grant being filed.

Eleanor Reay, the wife of the Rev. S. Reay, by her will,

1862. date January 30th, 1847, disposed of all the property to  
 June 16. which she was entitled, whether under settlement or not, and

In the Goods of appointed Henry Hargreaves and George Hargreaves executors.  
 ELEANORA  
 REAY.

Her husband afterwards, on the same day, signed a memorandum consenting to her making the above will, and giving his approval thereto in all respects. Mrs. Reay died on the 1st of January, 1861, and her husband died on the 20th of January, 1861.

On the 14th of May, 1861, probate was granted to her executors, limited to such personal estate and effects as she, by virtue of her marriage settlement dated 6th of April, 1832, had a right to appoint or dispose of, and had by her said will appointed or disposed of.

Subsequently to the date of her marriage, she became entitled to some real estate, and had, with her husband's concurrence, received the rents of these estates, and had during coverture accumulated considerable sums of money, which she had invested in her own name in London and North-Western Railway Shares, and in Consols. The London and North-Western Railway Company and the Bank of England had refused to register the probate or to permit the sale and transfer of the shares and stock.

*Dr. Spinks* moved the Court to revoke the limited probate, and to grant a general probate to the executors without limitation.

SIR C. CRESSWELL: Is not the husband always entitled to the general *cæterorum* grant?

*Dr. Spinks*: I believe a *cæterorum* grant is only made when no executors have been appointed, but that when executors have been appointed by the will of a married woman, and such will is made with the husband's consent, the executors are entitled to the grant.

SIR C. CRESSWELL: Have you any authority to that effect? 1862.  
A different opinion seems to prevail in the Registry. June 16.

Dr. Spinks: I can adduce no authority, but I believe the practice is as I have stated. In the Goods of  
ELEANORA  
REAY.

SIR C. CRESSWELL: Mr. Justice Williams, in his able work on the 'Law of Executors and Administrators,' says, "That in order to establish the will of a married woman, the husband's consent to it should be given when it is proved." As in this case, in consequence of the husband's death, such consent cannot be obtained, would not his personal representative be entitled to the *cæterorum* grant?

Dr. Spinks: Yes; if there were property of the wife's other than that disposed of by the will, but not otherwise. However, a proxy of consent to the probate of this will being granted, has been executed by the personal representative of the husband, and is in Court, but has not yet been stamped.

SIR C. CRESSWELL: I am informed by the Registrar that it is not the practice to grant *general probate* of the will of a married woman, but that it must be limited to such property as she has the power to dispose of; and also that if the husband were living, and were to go with the executors to the Registry, and consent to a general grant being made, the grant would in form be a general grant of *administration with the will annexed*, and not of probate, because, as stated by Williams, J., by his consent the husband waives his rights to administration. With the proxy of consent by the husband's representatives, the executors must, in some form or other, be entitled to represent the wife, and, in virtue of that representation, take all her property. Upon such proxy being left in the Registry I will revoke the probate, and decree a general

1862. grant of administration, with the will annexed, to be granted  
June 16. to the executors.

In the Goods of  
ELEANORA  
REAY.

The grant was made as follows:—

“The Judge having read the affidavits of,” etc. . . . “re-  
voked the probate of the last will and testament of the said  
“Eleanora Reay (wife of Stephen Reay), deceased, heretofore  
“granted, to wit, on the 17th of May, 1861, at the District  
“Registry attached to the Court at Oxford, under certain  
“limitations, to the said Henry Hargreaves and George Har-  
“greaves, the executors therein named, and decreed letters of  
“administration, with the said will annexed, of all and  
“singular the personal estate and effects of the said deceased  
“to the said Henry Hargreaves and George Hargreaves, the  
“executors named in the said will, on giving the usual  
“security; the said Stephen Reay, the lawful husband of the  
“said deceased, having survived the said deceased, and Isabella  
“Douglas, the administratrix of all and singular the personal  
“estate and effects of the said Stephen Reay, having con-  
“sented.”

1859.

Jan. 31, and  
Mar. 2 and 23.

In the Goods of GLASTONBURY NEVILLE (deceased).

*Military Will.—Proof of Signature of Testator.—*

*Rules.—Practice.*

In the Goods of  
GLASTONBURY  
NEVILLE.

Where a Will made by an officer whilst engaged on active military service was signed by him, but not attested, the Court required, in accordance with the practice of the Registry, that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, and that the form for an affidavit given in the Rules should be strictly followed.

Glastonbury Neville, late a lieutenant in the Royal Engineers, was killed in action, January 31st, 1858, at Barodia in

the East Indies, being a bachelor. While serving in the Crimean War, in 1855, he made a will and codicil. The will commencing, "Camp before Sebastopol, April 2nd, 1855," was written on three sides of a sheet of note-paper, with the testator's signature at the end of the second side, but not at the end of the third side. On the fourth side was endorsed "My will, G. Neville, April 2nd, 1855." The codicil folded on the fourth side, and was dated June 7th, 1855, but was unsigned. The testator had told his brother, Lieut.-Col. Neville, in April, 1855, that he had made his will, and had then shown to him, as he believed, the will in question.

1859.

Jan. 31, and  
Mar. 2 and 23.In the Goods of  
GLASTONBURY  
NEVILLE.

*Mr. J. B. Karslake* moved for administration, with will annexed, to be granted to Lieutenant-Colonel Neville as a legatee. January 31.

SIR C. CRESSWELL: There is a difficulty in my granting this motion. The only person who makes an affidavit of the will and codicil being in the handwriting of the deceased, is Lieut.-Col. Neville, who takes an interest under the will as a legatee. When it is necessary to prove the signature to a will to be in the testator's handwriting, the rules require this to be proved by the affidavit of two disinterested persons.

*Motion adjourned.*

*Dr. Spinks* renewed the motion.

March 2.

SIR C. CRESSWELL: The further affidavits are defective. They do not follow the Form 24, given in the rules for an affidavit of handwriting. Again, one of the deponents, Col. Chapman, does not state how he became acquainted with the deceased's handwriting, and neither of the deponents state in terms that the name of the deceased, which is at the end of the second and third pages of the will, is in his handwriting. The invariable practice of the Registry is that the affidavit

1859. should in terms state the signature to be in the handwriting  
 Jan. 31, and of the deceased.  
 Mar. 2 and 23.

March 23. *Dr. Waddilove* renewed the motion on fresh affidavits.  
 In the Goods of  
 GLASTONBURY  
 NEVILLE. SIR C. CRESSWELL granted the motion.

February 9. In the Goods of WILLIAM HACKETT (deceased).  
 In the Goods of  
 WILLIAM  
 HACKETT. *Military Will.—Practice.—Rules for Non-contentious Business, R. 59 (1857).*

Where a Will made by a soldier while engaged on active military service was signed by his mark, before the Will can be proved an affidavit must be filed in the Registry in compliance with the rules, that the deceased had at the time of its execution a knowledge of its contents.

William Hackett, late of the 60th Rifles, died on the 17th of September, 1857, at Delhi, of wounds received during the siege of that place. He left a will made while in active military service, which he executed by affixing his mark, and which was attested by two witnesses, who were supposed to be still in India. The Registrar had refused to grant letters of administration with the said will annexed, on the ground that it was on the face of it the will of an illiterate person, and that, therefore, there should be an affidavit of its having been read over to the deceased before execution, in compliance with Rule 59 (1857).

*Dr. Wambey* moved for the grant. Rule 59 was not intended to apply to the wills of soldiers made on active military service. The spirit of legislation for centuries has

been to exempt such wills from the formalities required in the case of other wills.

1859.

February 9.

In the Goods of  
WILLIAM  
HACKETT.

SIR C. CRESSWELL: Rule 59 is in general terms and applies to wills made by soldiers, as well as to wills made by other persons. A hardship may occasionally result from adhering strictly to the rules, but I have no authority to dispense with them. As the testator executed the will as a marksman, he is an illiterate person within the meaning of the rule, and I cannot make the grant until I am satisfied that he had at the time of its execution knowledge of its contents. If in any way I am satisfied of that fact, I will decree administration as prayed.

THE QUEEN'S PROCTOR *v.* WILLIAMS.

1862.

March 18.

*Trial by Jury.—Interest Suit.—Pedigree.*

THE QUEEN'S  
PROCTOR  
*v.*  
WILLIAMS.

In an interest suit in which a question of legitimacy was raised between a person claiming to be the lawful nephew and next of kin of a deceased intestate and the Queen's Proctor, the Court directed the issues joined to be tried by a jury, on the application of the next of kin, although the application was opposed by the Queen's Proctor.

This was an interest suit.

The *Queen's Proctor*, on behalf of the Crown, alleged that Mary Emsley, the deceased, died a bastard, intestate, and a widow. The defendant Samuel Williams alleged that he was the lawful nephew and next of kin of the deceased.

*Dr. Spinks*, for the Queen's Proctor, moved that the case might be heard before the Court without a jury. It was a

1862. question of pedigree, for which a jury was not the most satisfactory tribunal. The 35th section of the Probate Act (20 & 21 Vict. c. 77) gave the Court a discretion as to the trial of questions of fact by jury, except in cases where the heir-at-law intervened. In those cases the trial by jury was compulsory.

*Dr. Wambey*, for the defendant, moved for a jury. The defendant claimed to be heir-at-law, although he did not allege it in the pleadings.

SIR C. CRESSWELL: I think the leaning of the statute is in favour of trial by jury.

*Order that the issues should be tried by a jury accordingly.*

1859.

(Before THE JUDGE ORDINARY.)

Nov. 16 and  
Dec. 7.

BAYLEY v. BAYLEY.

BAYLEY  
v.

BAYLEY.

*Sequestration Attachment.—Writ of Assistance.—Practice.*

A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property, which was in the hands of parties holding under the person whose estate had been sequestered, and was refused possession. The Court declined to enforce the sequestration by an attachment against those parties, but granted a writ of assistance to the sheriff for that purpose.

A writ of sequestration having been granted by the Court to enforce an order for the payment of costs by Bayley, the sequestrator had demanded the rents and profits of the estate, but the parties in possession, who were tenants under Bayley, refused payment.



*Mr. Baker Green* moved for an attachment against the persons who had refused payment of the rents to the sequestrator. The 25th section of the Probate Act (20 & 21 Vict. c. 77) enacted that the Court of Probate should have the like powers, jurisdiction, and authority for "enforcing all orders, "decrees, and judgments made or given by the Court under this "Act, and otherwise in relation to the matters to be inquired "into or done by, or under the orders of the Court under this "Act, as are by law vested in the High Court of Chancery for "such purposes, in relation to any suit or matter depending in "such Court."

1859.  
Nov. 16 and  
Dec. 7.  
BAYLEY  
v.  
BAYLEY.

THE JUDGE ORDINARY: A sequestration cannot be enforced in this manner *per saltum*. An attachment against the tenants is out of the question. *Motion refused.*

*Mr. C. Pollock* moved for a writ of assistance. The sequestrator having demanded possession, and having been refused, his proper course was to ask the assistance of the sheriff to enforce the writ. Not having been able to obtain peaceable possession, the sheriff was required to be present when the writ was enforced, in order that no illegal act might be committed. (Seton on Decrees, p. 425; 2 Daniel's Chancery Practice, 957.)

Dec. 7.

THE JUDGE ORDINARY: Can a sequestrator, under a sequestration issued by the Court of Chancery, turn a man *vi et armis* out of his house, and take possession without any preliminary proceeding in the nature of an ejectment?

*Mr. C. Pollock*: There is no rule in the books of Chancery practice as to the proper mode of proceeding in a case like the present.

1859. SIR C. CRESSWELL: You may have a writ of assistance,  
 Nov. 16 and Dec. 7. and take the consequences, whatever they may be.

*Writ of assistance granted.\**

BAYLEY

v.

BAYLEY.

1863.

In the Goods of CARMICHAEL (deceased).

February 3.

In the Goods of  
 CARMICHAEL.

*Survivorship.—Presumption.—Testator and Legatee drowned  
 at same time.*

Where the testator and his residuary legatee have been drowned at the same time in the same ship, the legacy is extinguished, and the grant will be made as in case of an intestacy.

James Carmichael sailed on January 2, 1861, in command of the steam-ship 'Vedra,' together with his son James Carmichael, who was a petty officer on board her, from Sunderland for Copenhagen. The ship and all the crew were supposed to have been lost at sea. James Carmichael, the father, had left a will, of which he appointed John Gray sole executor and residuary legatee in trust, and his wife, Lettes Carmichael, residuary legatee for life or widowhood, and his son, James Carmichael, residuary legatee after her death or re-marriage. John Gray had renounced his right to the grant, and letters of administration had been granted to Lettes Carmichael, as beneficial residuary legatee for life or during widowhood. She had since married John Burn, whereupon the grant ceased.

*Mr. G. S. Percival* moved for a grant of cessate letters of

\* A form of a writ of sequestration is to be found in Daniel, Ch. Pr. p. 815 (3rd edit.), and that of an order for a writ of assistance in Seton on Decrees, p. 425.

administration (with will annexed) to Mrs. Burn, as the lawful relict of the deceased. It being impossible to ascertain whether the father or son was the survivor, the residuary bequest over would not take effect, and the deceased was therefore now intestate as to his residuary estate.

1863.

February 3.

In the Goods of  
CARMICHAEL.

SIR C. CRESSWELL : Mrs. Burn is entitled to the grant. The only question was, whether Mrs. Burn should take out administration to her son. In Williams on Executors, 5th ed. p. 1084, is this passage :—" It has been established from " the earliest periods, both in the Ecclesiastical Courts and in " Equity, that unless the legatee survive the testator, the " legacy is extinguished ; neither can the executors or administrators of the legatee demand the same." And Swinburne puts the case of the testator and legatee being drowned in the same ship, or both being struck to death by the fall of a house ; in which case he lays it down :—" That as they both " died at the same time the legacy is not due, and consequently " not transmissible to the executors or administrators of the " legatee." Mrs. Burn, therefore, cannot take the legacy as administratrix of her son, and need not take out administration to him.

*Motion granted.*

# SUPPLEMENT TO CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1859.

D'OYLEY v. D'OYLEY and BALDIE.

March 9.

*Alimony pendente Lite.—Dissolution of Marriage.—Practice.*

D'OYLEY

v.

D'OYLEY AND  
BALDIE.

*Alimony pendente lite* was allotted after there had been a verdict of adultery against the wife, but before the case came on for a final decree before the full Court.

In this case the issue of adultery was tried before the Judge Ordinary and a common jury, who found a verdict against the wife. The case had not yet come before the full Court.

*Dr. Addams*, Q.C., moved for *alimony pendente lite*.

*Dr. Swabey* appeared for the petitioner.

THE JUDGE ORDINARY: As it may be some time before there is a sitting of the full Court, *alimony pendente lite* may be allotted.

KELLY v. KELLY.

1863.

April 21.

*Alimony pendente Lite.—Wife a convicted Felon.*

KELLY  
v.  
KELLY.

*Alimony pendente lite* will be allotted to a wife, even though at the time of the allotment she is in gaol undergoing a sentence for felony.

This was an application for *alimony pendente lite* in a suit by the husband for a dissolution of marriage. The husband's answer to the petition for alimony was filed on the 19th of March, 1863, and he had since filed an affidavit that the wife was convicted on the 27th of March, 1853, of felony, upon her own confession, and was sentenced to imprisonment for six months with hard labour, which sentence she was now undergoing.

*Dr. Spinks* moved the Court to allot *alimony pendente lite*.

*Mr. Martin, contra* : The principle upon which alimony is allotted, is that the wife ought not to be left without means of support. This principle has no application in the present case, for the wife is maintained at the expense of the country.

THE JUDGE ORDINARY : That is no ground for refusing alimony.

*Mr. Martin* : By the conviction all the wife's property is forfeited to the Crown. She, therefore, cannot receive alimony.

THE JUDGE ORDINARY : Then let the Crown take it. I think she is entitled to alimony. I allot alimony at the rate of £44 per annum, payable monthly.

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1863.  
January 20.

SMITH v. SMITH and TREMSAUX.

SMITH  
v.  
SMITH AND  
TREMSAUX.

*Alimony pendente Lite.—No Answer filed by Wife.*

Where a wife is charged in her husband's petition with adultery, and has filed no answer to it, she is still entitled to have alimony *pendente lite* allotted to her.

*Dr. Spinks* moved for an allotment of alimony *pendente lite*.

*Mr. Patchett* : The wife has filed no answer in the suit, and her time for answering has expired. She must be taken, therefore, to have admitted the charge of adultery.

THE JUDGE ORDINARY : During the first year of my presiding in this Court, I think I must have decided in some fifty cases that a wife, when she applies for alimony *pendente lite*, must be considered as innocent. Those decisions were in accordance with the practice of the Ecclesiastical Court. There was no appeal from them. I shall therefore adhere to this rule, and make the order.

1863.  
July 14.

DAVIS v. DAVIS.

DAVIS  
v.  
DAVIS,

*Permanent Alimony.—Diminution of Husband's Income.—Affidavits.*

Where a husband's income has diminished since the allotment of alimony *pendente lite*, he may, on a motion for permanent alimony, prove such diminution by affidavit.

In this case the Court had allotted alimony *pendente lite* on an income of £300 per annum upon the husband's answer.

*Mr. R. Pritchard* moved for an allotment of permanent alimony on the same income. 1863.  
July 14.

*Dr. Deane, Q.C.:* The husband has filed affidavits, showing that his income has diminished since alimony *pendente lite* was allotted. DAVIS  
v.  
DAVIS.

*Mr. R. Pritchard:* He should have alleged this in a petition. The affidavits cannot be used.

THE JUDGE ORDINARY: I think the affidavits may be used.

PARR v. PARR AND WHITE.

March 24.

*Attachment.—Non-payment of Alimony.—Office Copy of an Order for Alimony.—Attachment.—Right to Object.* PARR  
v.  
PARR AND  
WHITE.

It is competent to a party to object, on a motion for attachment for non-compliance with an Order of the Court, to the sufficiency of the service of the Order on him.

Service of an Order for the payment of Alimony is effected by showing to the party to be served an office copy of the Order, and by leaving with him a copy of it.

*Dr. Spinks* moved for an attachment against the husband for non-payment of alimony *pendente lite*. Service of the order had been effected on the petitioner by leaving *with him a copy of the order*, and at the same time showing *him the original office copy*.

*Mr. R. Pritchard:* The service was insufficient. The original order should have been produced. In *Davies v. Davies*, 2 Swab. & Tris. 437, which was a motion for attachment for

1860. non-payment of costs, it was held that the original order  
 March 24. should be produced.

PARR  
 v.  
 PARR AND  
 WHITE.

*Dr. Spinks*: The original order in this case was entered in the Court Book, and therefore could not have been produced. Moreover, the petitioner, by appearing by counsel, has waived objection to the service.

THE JUDGE ORDINARY: The petitioner is not precluded from objecting to the sufficiency of the service by his appearing to oppose this application for an attachment. There is this distinction between the case cited and the present one. According to the practice of the Registry, an order for payment of *costs* is signed by the judge, and that is the original order which is delivered to the party in whose favour it is made; but in the case of alimony, the original order for payment of alimony is entered in the Court Book, and is not signed by the judge. The party in whose favour it is made can, therefore, only have an office copy of it. I think the service is sufficient, and shall grant the attachment.

*Motion granted.*

1860.

SEATEL v. SEATEL.

July 25.

SEATEL  
 v.  
 SEATEL.

*Maintenance of Children.—Order for Settlement of Wife's Property.—Power of Appointment.*

The Court made an order for the trustees of a wife's settled property, against whom a decree of judicial separation had been pronounced, on the ground of her adultery, to pay a moiety of the income of such property for the maintenance and education of the children.

The Court cannot vary a power of appointment vested in a guilty wife.

This was a husband's petition for a judicial separation on



the ground of the wife's adultery. The adultery was proved, on February 18th, 1860; but the decree was suspended in order that an application might be made for the settlement of some property belonging to the wife.

1860.  
July 25.  
SEATEL  
v.  
SEATEL.

*Dr. Phillimore, Q.C.*, moved, under section 45 of 20 & 21 Vict. c. 85, for an order for a settlement of the wife's property for the benefit of the petitioner and his children.

The respondent did not appear.

The petitioner was a surgeon, dependent on his profession, and the respondent was entitled to £160 a year, the income of £4000, over which she had a power of appointment amongst her five children.

THE JUDGE ORDINARY: I cannot interfere with the power of appointment; that is not the property of the wife. Under the 45th section of 20 & 21 Vict. c. 85, the Court must order *a settlement* of the property. The language differs from that of 22 & 23 Vict. c. 61, s. 5 which enables the Court "to make such *orders* with reference to the application of the property settled as to it shall seem fit." The wife's property is the interest of a sum of £4000. If I make an order that a portion of the interest be paid to the husband, upon his death the order would be at an end. But if I order a settlement, and that it be paid to the trustees under it, in the event of their death, the Court of Chancery would appoint others. The opinion of Lord Campbell was, that the 45th section of 20 & 21 Vict. c. 85, gave the Court no power to alter settlements. I think the better course will be, for the petitioner to name a trustee, and then for the Court to order the wife's trustees to pay a certain portion of the interest to that trustee, to be applied to the maintenance and education of the children; or I might order the trustees to retain a

July 25.

1860. certain portion of the interest, and apply it for the benefit of  
 July 25. the children. The motion had better stand over.

SEATEL  
 v.  
 SEATEL.

*Dr. Phillimore* suggested that the petitioner's mother should be the trustee.

July 25. THE JUDGE ORDINARY: Though there would be no legal objection to her acting as trustee, it is not usual to have a female trustee.

*Mr. F. Russell* appeared for the respondent.

Two trustees were afterwards named by the petitioner.

July 25. THE JUDGE ORDINARY now said: In this case I shall make an order that the trustees in whom the property to which the wife is entitled is vested, pay over £80 per annum, a moiety of her income, to the trustees who have been named by the petitioner, to be applied by them toward the maintenance and education of the children of the marriage.

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HARRIS v. HARRIS AND LAMBERT.

1862.

June 11. *Collusion.—Dissolution of Marriage.—Respondent assisting in Identification.*

HARRIS  
 v.

HARRIS AND  
 LAMBERT.

Where the respondent, who did not appear, and gave the petitioner's solicitor a photograph to aid in her identification, and attended in Court for the same purpose, for which attendance she received from the petitioner's solicitor £1, the Court having reason to believe that the parties were not acting in collusion, pronounced the decree.

In this case the respondent did not appear, but at the hearing it appeared that she had been in communication with the petitioner's attorney, had given him a photograph of her-

self to enable him to identify her, and that she was in attendance in the Court at the hearing for the purpose of being identified, for which attendance she had received £1 from the petitioner's attorney.

1862.

June 11.

HARRIS  
v.

HARRIS AND  
LAMBERT.

*Dr. Phillimore, Q.C. (Mr. E. Lewis with him) appeared for the petitioner.*

THE JUDGE ORDINARY: I must take time to consider whether the above facts constitute such collusion as to disentitle the petitioner to his decree. *Cur. adv. vult.*

THE JUDGE ORDINARY: In this case the adultery was fully established, for it appears that during the absence of the petitioner in Australia, whither he had gone to improve his circumstances, the respondent had been leading a most profligate life; but I reserved my judgment, in consequence of some communication which took place between the petitioner's attorney and the respondent. The respondent had given the petitioner's attorney a photograph of herself to assist in her identification; she also attended in Court at the trial for the purpose of being identified, and for so doing received a small sum of money from the petitioner's attorney. Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion, and therefore pronounce a decree.

*Decree nisi.*

1859.  
January 8.

(*Before the Full Court: LORD CAMPBELL, C.J., MARTIN, B.,  
and THE JUDGE ORDINARY.*)

CURTIS  
v.  
CURTIS.

CURTIS v. CURTIS.

*Condonation not Pleaded.—Cruelty.*

Condonation proved at the hearing will be noticed by the Court, although it has not been pleaded.

This was an appeal by the husband against the decree of the Judge Ordinary pronouncing for a judicial separation in favour of the wife, on the ground of cruelty.\* The appellant argued the case in person.

*Mr. Forsyth, Q.C.,* and *Mr. Mundell* appeared for the respondent.

The principal objections taken by the appellant to the decree were, that the acts of cruelty charged prior to September, 1850, had been condoned by his wife; and secondly, that evidence was received of acts of cruelty done by the appellant in 1857, although the petition contained no charge of cruelty subsequent to June, 1852.

LORD CAMPBELL, C.J.: I see no reason to doubt the propriety of the decree for a judicial separation pronounced by the Judge Ordinary. I agree with the conclusions arrived at by the Judge Ordinary, both as to the law and the facts of this case. The law with respect to cruelty and condonation, laid down by the learned Judge, has not been disputed by the appellant, and is perfectly sound. There being, then, no question as to the law laid down, we have only to apply it to the facts proved at the hearing. It seems to me that Mr. Curtis was proved to have been guilty of conduct at times when he was responsible for his acts, both before he went

\* 1 Swab. and Tris.

to America and after his return, which amounted to legal cruelty. I agree with the Judge Ordinary, that, if there had been proof at the hearing that the cruelty had been condoned, the Court would, even without a plea of condonation, be bound to take notice of the condonation; but I found no proof of such condonation. The conduct of Mr. Curtis, after he returned from Spain, was such upon the evidence as to remove the effect of any previous condonation, and amounted in itself to *savitia*. I refer to his conduct when he went over to Ireland. From his own account, his then state of mind, as evinced by his actions and words, was such as to render it impossible for Mrs. Curtis, with any regard to her own safety, to live with him again. He acknowledged to have said to her, in the interview he had with her at her father's house in Ireland, "May God curse you, and may God curse your father." This expression, coming from a man who made a great profession of his religious and Christian conduct (in which I have no doubt he is quite sincere), shows clearly that Mr. Curtis has no control over his feelings or words. Mrs. Curtis, after such an interview, could not with propriety have consented to have returned to him. It appeared, too, that this was not a sudden ebullition of passion, afterwards repented of; for, subsequently, when Mrs. Curtis, in order to escape from him, had assumed another name, he issued placards, giving a most degrading description of her, and in doing so, says that he acted under advice. I feel no doubt that it is impossible for Mrs. Curtis to continue further cohabitation with her husband with safety to herself, and the decree for a judicial separation will therefore be affirmed.

1859.  
January 8.  
CURTIS  
v.  
CURTIS.

MARTIN, B., concurred.

*Decree affirmed.*

1858.

HOOKE v. HOOKE.

December 20.

HOOKE

v.

HOOKE.

*Confrontation,—Dissolution of Marriage.—Practice.*

The Court has no power to decree confrontation in a suit for dissolution of marriage, for the purpose of identification.

This was a petition for dissolution of marriage on the ground of the wife's adultery, who had filed an answer.

*Dr. Spinks* moved for an order to be made on the respondent to attend to be confronted with the petitioner's witnesses for the purpose of her identification.

*Mr. Geo. Brown, contra.* By the practice of the Ecclesiastical Courts; a decree of confrontation was only made in a suit for nullity of marriage. The 22nd section of the Divorce Act, which directs this Court to follow the practice of the Ecclesiastical Courts, excepts from its operation suits for dissolution.

THE JUDGE ORDINRAY: The practice of the Ecclesiastical Courts to decree confrontation, does not apply to a suit for dissolution. By giving the Court, under the 43rd section of 20 & 21 Vict. c. 85, express power to order the petitioner to attend at the hearing, the Legislature seems to have assumed, that without express power, the Court could not compel the attendance of the parties. It might have, but has not, given a similar power to compel the attendance of respondents.

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NORRIS *v.* NORRIS, LAWSON, AND MASON.

1861.

January 28.

*Costs.—Condonation.—Co-respondent.*

NORRIS

*v.*

NORRIS,  
LAWSON  
and  
MASON.

Where a husband has condoned adultery committed with a co-respondent, which has been revived by adultery committed by another person, costs will not be given against the co-respondent whose adultery was condoned.

The respondent in this case was guilty of adultery with Lawson in 1851, which was condoned by the petitioner. In October, 1857, she eloped with the co-respondent, Mason.

The adultery with Lawson in 1851 was proved, and there was evidence of adultery with Mason against the respondent, but not against Mason himself.

THE JUDGE ORDINARY: The petitioner is entitled to a decree *nisi* for dissolution of the marriage against the respondent, but there is not sufficient evidence to justify a decree as against Mason.

*Dr. Spinks* asked for costs against Lawson. Condonation of the adultery with Lawson would be a bar to a suit by the husband against her, but it would not affect his remedy against the adulterer.

THE JUDGE ORDINARY: I cannot condemn Lawson in costs. The petitioner, by condoning his wife's adultery with Lawson, has waived all right to any proceedings against him in this Court. The usual course is to grant costs against a co-respondent when his conduct has made a suit necessary. Here the wife's subsequent misconduct, and not her adultery with Lawson, rendered the suit necessary.

*Decree nisi: no order as to costs.*

1860.

PRISKE v. PRISKE AND GOLDBY.

January 23.

(Before the Full Court: THE JUDGE ORDINARY, CHANNELL, J.,  
and KEATING, J.)

PRISKE

v.

PRISKE

AND

GOLDBY.

*Costs.—Co-respondent.*

Where there was no evidence to show that the co-respondent when he first formed the connection with the respondent, knew that she was a married woman, the Court refused to condemn him in costs.

This was an undefended case. The adultery was proved, and the decree pronounced.

*Dr. Spinks*, for the petitioner, asked for the co-respondent to be condemned in costs.

THE JUDGE ORDINARY: If it had appeared that the co-respondent at the time when his connection with the respondent began, knew that she was a married woman, living apart from her husband, and receiving an allowance from him, the Court would decidedly have condemned him in costs. But it appears that the respondent was a dissolute woman, of drunken and profligate habits, and that she had been separated a considerable time from her husband when she met with Goldby; and there is nothing to show that he had the least knowledge as to who or what she was when he met with her, except that she was disposed to become a prostitute.

CHANNELL, B., concurred.

KEATING, J.: I entertained considerable doubt whether the co-respondent ought not to pay costs, in consequence of an expression which one of the witnesses heard him use, that



“he found it very convenient to have a little allowance.”  
But it is better to adhere to the strict rule; and on the whole, I agree with the Judge Ordinary that the case is not within it.

Marriage dissolved, without costs against co-respondent.

1860.  
January 23.

PRISKE  
v.  
PRISKE  
AND  
GOLDBY.

(*Before the Full Court: COCKBURN, C.J., WHITEMAN, J.,  
and THE JUDGE ORDINARY.*)

KAYE v. KAYE.

1858.  
June 14.

KAYE  
v.  
KAYE.

*Costs.—Practice.—Dissolution Decreed in favour of Wife.*

A wife, in whose favour a decree for a dissolution of marriage is made, is entitled to costs against her husband, where no order has been made.

The Court in this case had pronounced a decree dissolving the wife's marriage on the ground of her husband's adultery and desertion.

*Mr. Overend, Q.C. (Dr. Spinks with him),* asked the Court to condemn the respondent in the petitioner's costs.

THE JUDGE ORDINARY: The petitioner is entitled to her costs as a matter of course in this case, without any order of the Court. Such was the practice in the Ecclesiastical Courts, where the wife was the successful suitor, and though this Court has, under the 51st section of 20 & 21 Vict. c. 85, a discretionary power as to ordering the payment of costs, yet, where no order is made, the practice of the Ecclesiastical Court as to costs will be adhered to.

1858.  
June 14.

KAYE  
v.  
KAYE.

COCKBURN, C.J.: Where the Court pronounces a decree for a dissolution of marriage in favour of the wife, and makes no order as to costs, they will follow the decree as a matter of course.

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1861.  
July 27.

MILNER  
v.  
MILNER.

MILNER v. MILNER.

*Cruelty.—Treating a Wife as a Prostitute in the Street.*

Where a husband assaulted his wife in the street in such a manner as to induce a passer-by to believe her to be and to treat her as a prostitute.

HELD, that although the respondent had inflicted no personal injury upon her, yet that he was guilty of cruelty.

This was a wife's petition for dissolution of marriage, on the ground of cruelty and adultery. The evidence of cruelty was substantially as follows:—The parties were married in 1843. In 1846 the respondent in a quarrel struck the petitioner with a slipper upon her back, and in another quarrel in the same year he struck her across the shoulders with a leather strap. He constantly neglected her. In April, 1858, whilst they were staying in the house of a friend in London, the petitioner insisted upon accompanying the respondent against his will on a certain occasion when he was leaving the house. They went together in an omnibus to the City, and upon getting out she followed him to Fenchurch Street, when he turned round and said she should go no further, and taking her by the shoulders and making use of the most filthy language, he pushed her against the wall, and thrust his umbrella against her person. The blow inflicted no pain, but in consequence of his conduct a man passing by at the time took her for a prostitute, and seized hold of her

leg. She being indignant at this treatment, released herself from her husband's grasp, and returned to the friend's house. She lived with him for a month afterwards, and then left him. The friend at whose house she was staying was examined, and stated that she remembered the petitioner coming home on the night of the assault much distressed, and that the respondent had stated to her that he had been served with the petition in this suit, and that his conduct on this occasion, as stated in the petition, looked very ugly in black and white.

*Dr. Phillimore, Q.C., and Mr. R. Pritchard* for the petitioner.

The respondent did not appear.

THE JUDGE ORDINARY: A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. I can imagine nothing more insulting or shocking to a woman of proper feeling than being so treated. If there had been no evidence but that of the petitioner's, I should have felt some doubt, whether the respondent had been guilty of the act imputed to him. But that act was described in detail in the petition as an act of such a character, and done in such a manner, as to hold out to passers-by that he was dealing with a common prostitute. The respondent on reading that petition said, "It was all true, and that it did look ugly enough in "black and white," and he does not now appear to defend himself. It is a case of the grossest and most abominable cruelty, and, combined with the adultery, entitles the petitioner to a decree of dissolution of marriage.

*Decree nisi, with costs.*

1861.

July 27.

MILNER

v.

MILNER.

1859. (Before the Full Court: THE JUDGE ORDINARY, BRAMWELL, B.,  
November 19. and BYLES, J.)

MACDONALD  
v.  
MACDONALD.

MACDONALD v. MACDONALD.

*Desertion.—Effect of an Allowance to Wife by Husband.*

A wife is entitled to the society and protection of her husband, and if, after refusing to live with her, he gives her an allowance, the payment of such allowance to her is no answer to the charge of wilful desertion.

This was the wife's petition for dissolution of marriage on the ground of adultery and desertion.

*Dr. Phillimore, Q.C., and Mr. J. D. Coleridge* appeared for the petitioner.

The respondent had entered no appearance.

The parties were married in the Bombay Presidency in 1847, the petitioner being a member of a Scotch family, and the respondent a lieutenant in the 22nd Regiment, Bombay Infantry. They lived in harmony in India until February, 1852. Shortly before this, the respondent, who through reckless extravagance had become greatly involved, was imprisoned at Bombay for debt, when his wife lived with him and nursed him in gaol. On his release in February, 1852, he supplied her with funds, and sent her home in order that she might get assistance from their friends in England to enable him to remain in the army. During her absence in England he sold out of the army, and proceeded to Australia, and wrote to request her to join him there. She accordingly went out to Australia, and found him there living with another woman as his wife, and he, after repeated applications from the petitioner, refused to live with her. Some correspondence was put in evidence, from which, as well as from the peti-

tioner's own evidence, it appeared that the respondent had engaged to make her an allowance.

1859.

November 19.

THE JUDGE ORDINARY (after consultation): We have been considering whether the circumstance of a husband supplying a wife, whom he has abandoned, with an allowance is a good answer to a charge of wilful desertion, and we are of opinion that it is not. A wife is entitled to the society and protection of her husband, and we think, that he is not to be permitted, after having refused her his society and protection, to turn round and say that he has not been guilty of wilful desertion, merely because he has made her an allowance.

MACDONALD  
v.  
MACDONALD.

Upon hearing further evidence, a decree was pronounced in favour of petitioner upon the ground of adultery and desertion.

*J. C. Searle & Smith 118*

SOPWITH v. SOPWITH.

December  
23 and 24.

*Direct Evidence of Adultery.—Employment of Private  
Detectives.*

SOPWITH  
v.  
SOPWITH.

In support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband; but, in consequence of the improbability of that evidence, of the discrepancies in the statements of the witnesses, and of the improper manner in which it had been got up by the private detectives employed by the petitioner, the Court refused to act upon it, and dismissed the petition.

The petitioner, Matilda Sopwith, alleged a marriage with Henry Lidsell Sopwith, in June, 1857, and cohabitation until May, 1858; and charged him with divers acts of adultery with Mary Ann Prickett in 1858 and subsequently, and

1859. prayed for a judicial separation. The respondent pleaded a denial of the adultery charged.

December  
23 and 24.

SOPWITH  
v.  
SOPWITH.

Mr. Sopwith was a surgeon, who had practised at Tunbridge Wells for 25 years. At the time of his marriage with the respondent he was a widower, his age being about 50; and he had a daughter residing with him who had attained her majority. The petitioner was 35 years of age; she was the daughter of a Mr. and Mrs. Deane, and she made the acquaintance of Mr. Sopwith in 1856, when she was staying with her father and mother at Tunbridge Wells, through his attending her in an illness. After the marriage Mr. and Mrs. Deane continued to live near them at Tunbridge Wells, and they were all for a short time on friendly terms. In the course of a few months complaints were made by Mr. and Mrs. Deane that Mr. Sopwith did not pay sufficient attention to his wife, and by Mr. Sopwith that Mr. and Mrs. Deane did not treat him with proper kindness and respect. On the 18th of May, 1858, Mrs. Sopwith, with her husband's sanction, accompanied Mr. and Mrs. Deane to Cheltenham to stay for a few days, and the following day she wrote to him in affectionate terms, giving an account of her journey and of the place where she was staying. He returned an answer, also in affectionate terms, but referring to the conduct of her father and mother, and mentioning one or two particulars of their behaviour to him, of which he thought he had a right to complain; and he said, "I shall, on your return, expect you not to visit them nor they you." Mrs. Sopwith in her reply accused him of want of affection in wishing to deprive her of the society of her parents, and suggested a separation. Some further correspondence passed, and Mrs. Sopwith never returned to her husband's house. With the sanction of her father and mother, she engaged a private detective named Shaw, and afterwards another named Topp, to make inquiries at Tunbridge Wells with respect to Mr. Sopwith's mode of life; and in consequence of the evidence they collected the

present petition was presented in June, 1859. The person with whom the adultery was charged to have been committed was a young woman of 24 years of age, Mary Ann Prickett, who went into Mr. Sopwith's service at the age of 14, when his first wife was alive, and remained in it until May, 1857, with the exception of two years, when she was obliged to stay at home from ill-health; she then went to London to assist in carrying on a millinery business, and returned to Tunbridge Wells in January, 1858, in order to see her father who was then on his death-bed, and lived in the house adjoining Mr. Sopwith's house, and remained there and re-entered Mr. Sopwith's service.

1859.

December  
23 and 24.

SOPWITH  
v.  
SOPWITH.

*Dr. Phillimore, Q.C., and Dr. Spinks, for the petitioner.*

*Mr. K. Macaulay, Q.C., and Dr. Wambey for the respondent.*

THE JUDGE ORDINARY; This is a case of very great im-  
portance; perhaps of more importance to one of the parties  
than to the other, and I have considered it with much  
anxiety. Last night, after the bulk of the evidence for the  
petitioner had been given, I examined it carefully, minutely,  
and I hope dispassionately; and having now heard the evidence  
on the other side, and the very able addresses of the learned  
counsel, I have formed a very decided opinion upon the case,  
and I think I am bound to express it at once, without going  
through the form of taking time to reconsider it.

The case is an unhappy one. It appears that Mr. Sopwith was married in 1857; that in 1858 his wife's father and mother were residing at Tunbridge Wells, and that an estrangement arose between him and his wife and her parents. The estrangement appears to have been carried to much greater lengths between Mr. Sopwith and the father and the mother than between him and his wife; and it is possible that a little more consideration and conciliation on the part of Mr. and

December 24.

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 December  
 23 and 24.  
 ———  
 SOPWITH  
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 SOPWITH.

Mrs. Deane would have prevented his parting with them upon bad terms when his wife went with them to Cheltenham, and if so the unfortunate discussion about a separation that followed would never have taken place. That discussion, however, did take place; and Mr. and Mrs. Deane and Mrs. Sopwith, being all arrayed hostilely against Mr. Sopwith, began to cast about for some explanation of his apparent coldness towards his wife. Naturally enough, they hit on the idea that he preferred some other woman; and accordingly one Shaw, a professed discoverer of malpractices of that sort, was employed to find out, if he could, some delinquency on the part of Mr. Sopwith. No suggestion was made from the beginning to the end of the case that the least suspicion existed in their minds, or that there was the slightest foundation for any suspicion against Mr. Sopwith up to that period. Mr. Deane's statement upon this point appeared to me so extraordinary, that although I believed I had accurately written upon my notes the date he gave for the employment of Shaw, I could not persuade myself that I had not been mistaken; but when I questioned him to-day he repeated that his daughter told him as early as August, 1858, that she had communicated with Shaw. Shaw, a person professionally employed in such matters, was at work from August, 1858, to June, 1859, without producing any result at all.

I feel bound here to make one or two observations upon the subject of the employment of men of the class to which Shaw belongs. They may be very useful for some purposes,—they may be instrumental in detecting malpractices which would otherwise remain concealed, but they are most dangerous agents. I say it advisedly,—it is my opinion, that they are most dangerous agents. Police detectives are most useful; they are employed in a government establishment, they are responsible to an official superior, they have no pecuniary interest in the result of their investigations beyond the wages they receive for the occupation that they follow, and they may



be and are constantly employed, not only with safety, but with benefit to the public. But when a man sets up as a hired discoverer of supposed delinquencies, when the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, then that man becomes a most dangerous instrument.

Shaw not having been sufficiently clever, or sufficiently vigilant, another person was set to work to make discoveries; and that man, Topp, appears to have been intrusted by the attorney for the petitioner to do that duty which properly belonged to the attorney. He has had the seeking out of all the witnesses, he has had communications with them again and again, three or four times repeated, and it is not until the last moment, after the briefs have been prepared, that the attorney's clerk sees and examines them. I trust the time is far distant when professional men, educated for their profession, and admitted on the rolls of the Courts, to which they are responsible for their conduct, will abandon their proper functions into the hands of such persons as appear to have been engaged in getting up this case.

[The learned Judge then proceeded to comment on the evidence given by the petitioner's witnesses.] One of them is a man of the name of Buss, who has been a coachman in the employ of Mr. Sopwith, and stated that he had on one occasion, when looking through a keyhole, seen Mr. Sopwith kiss Mary Ann Prickett, and that on another occasion he had seen Prickett go with Mr. Sopwith into his house late at night, and had afterwards seen the figures of two persons, that of a male and female, undressing in Mr. Sopwith's bedroom. There were other witnesses who spoke to having frequently seen Mr. Sopwith go to Mary Ann Prickett's house, and also to having seen them together one night under suspicious circumstances on a Common near the house; and one boy deposed to having witnessed an act of adultery, if he were right as to identity? [The learned Judge, having commented

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on the improbabilities and contradictions which appeared in the evidence of these witnesses, proceeded :—]

In one of the first cases I ever heard tried, I remember that half-a-dozen witnesses swore point-blank to something that they said they had seen, but the learned judge told the jury,—“It is not enough that witnesses should swear to that which is possible ; the least we can expect is that they should swear to something that is rather probable.” The character of a decent man would be in much peril if on such testimony as this, and contrary to all probability, the Court could arrive at the conclusion of his guilt. A vast deal of the evidence against Mr. Sopwith I throw overboard without any hesitation as unworthy of credit. What is the evidence on the other side? The people of the house to which he is said to have resorted so often give an account of the occasions on which he went there. The young woman with whom he is alleged to have committed the adultery has been exposed to the test of cross-examination, and has undergone it very satisfactorily, and she gave a reasonable account of the cause of her visits to his house. Comparing their evidence with that of the witnesses for the petitioner, and thinking that the case of the petitioner has been intrusted to hands that ought never to be employed in preparing cases of this kind for trial, I am not at all satisfied that the petitioner has established such a case as she was bound to establish against the respondent in order to entitle her to a decree. I therefore dismiss Mr. Sopwith from the suit.

*Petition dismissed.*

THE JUDGE ORDINARY: I find I cannot condemn the petitioner in costs. It is very hard upon Mr. Sopwith, but he must suffer.

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CARTLEDGE v. CARTLEDGE.

1862.

May 6.

CARTLEDGE  
v.  
CARTLEDGE.

*A Wife's Suit for Judicial Separation turned into a Suit for  
Dissolution of Marriage.—Re-service of Petition.*

Where both parties are before the Court, a wife's suit for judicial separation may be turned into one for a dissolution of marriage without issuing a fresh citation, but there must be a re-service of the petition on the respondent.

The wife had filed a petition for judicial separation, on the ground of cruelty. The husband had filed an answer denying the cruelty.

*Dr. Spinks* moved for leave for the petitioner to amend her petition by alleging adultery which had been committed by the husband before, but had come to the knowledge of the petitioner after the commencement of this suit, and to substitute a prayer for a dissolution of the marriage.

THE JUDGE ORDINARY: Can a suit for judicial separation be turned into one for a dissolution of marriage? Should not a fresh citation be issued?

*Dr. Spinks*: Not by analogy to the practice of the Ecclesiastical Court, both parties being before the Court. In a suit for restitution of conjugal rights, the other party might answer and pray for a divorce *à mensâ et thoro*.

*Aspland, contra.*

THE JUDGE ORDINARY: I must consider whether a fresh citation is not necessary.

*Cur. adv. vult.*

THE JUDGE ORDINARY: I have felt some difficulty in this matter. A case somewhat similar in its circumstances was

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May 6.

CARTLEDGE  
v.  
CARTLEDGE.

before the Court recently, but the application was of a different character. I was asked to grant the petitioner leave to withdraw his petition, and file a fresh one. I granted the application as a matter of course, upon certain terms. It occurred to me that there might be this objection to granting the present application; that if I did so, and a decree should be made, it might hereafter appear from the papers in the suit filed in the Registry that a decree of dissolution of marriage had been pronounced, whereas, the citation was to answer a petition for judicial separation. I think, however, that no such inconvenience would result, inasmuch as the order of the Court allowing the amendment would be filed, and it would appear upon the face of the papers that the original suit had been altered into one for dissolution of marriage; I think, therefore, that the amendment asked may be made, but the petition, when amended, must be reserved. The costs of the motion must not be taxed against the husband.

*Motion granted.*

1859.

CIOCCHI v. CIOCCHI.

November 13.

CIOCCHI  
v.  
CIOCCHI.

*Divorce à mensâ et thoro.—Judicial Separation.—Adultery.—*  
*Petition by a wife divorced à mensâ et thoro by an Ecclesi-*  
*astical Court.*

A wife who had obtained a decree from the Consistory Court of London for a divorce *à mensâ et thoro*, on the ground of adultery, filed a petition for a judicial separation, containing the same allegations as those on which the former decree was founded. The Judge Ordinary did not decline to receive the petition, but intimated a doubt whether he had jurisdiction to re-hear the case.

Mrs. Ciocchi instituted a suit against her husband in the Consistorial Court of London for a divorce *à mensâ et thoro*,

on the ground of adultery and cruelty. The husband appeared and denied these charges, and the Court, after evidence and argument, pronounced for the prayer of the wife, on the ground of adultery but not on that of cruelty. (1 Spinks, p. 121.) She had since filed a petition in this Court for a judicial separation, on the ground of adultery, in which she alleged the same facts as those upon which the decree of the Consistory Court was founded.

1859.  
November 13.  
CROCKET  
v.  
CROCKET.

*Dr. Phillimore, Q.C. (Dr. Tristram with him), moved,* under the 5th section of the 21 & 22 Vict. c. 108, that the evidence taken in the suit in the Ecclesiastical Court might be used in support of the petition for a judicial separation. The object of the petitioner was to obtain protection for her property.

THE JUDGE ORDINARY: I doubt whether you can call on this Court to re-hear all the divorce cases which have been decided in the Ecclesiastical Courts whenever a petitioner thinks some advantage can be gained by a decree of this Court. She perils nothing, for if I dismiss her petition she still remains divorced. My present impression is against the jurisdiction of the Court to try over again cases which have been tried in the Ecclesiastical Courts. The proceedings in those Courts were a necessary preliminary to an application to the House of Lords, and the jurisdiction of this Court is substituted for that of the House of Lords in cases of dissolution of marriage. I shall not refuse to receive the petition, but I hope when it comes on for hearing, the question will be fully discussed, as it is one of considerable importance. I dare say there are many cases in which wives will be anxious to avail themselves of the powers of this Court, which are beyond those of the Ecclesiastical Court, as to custody of children and giving them the control of their property.

*Application granted.*

1859. The case was not proceeded with, in consequence of an  
November 18. arrangement come to between the parties.

CIOCCI  
v.  
CIOCCI.

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The COUNTESS OF LIMERICK v. The EARL OF LIMERICK.

*Evidence.—Marriage in a British Colony.*

1863.

February 15. Proof of the solemnization of a marriage in a British Colony by a  
The COUNTESS of LIMERICK clergyman of the Church of England, according to the rites of that  
v. Church, is sufficient evidence of a marriage for the purposes of a  
The EARL of divorce.

LIMERICK.

This was a petition of the Right Honourable Margaret Jane, Countess of Limerick, for a judicial separation from the Right Honourable William Tennyson Terry, Earl of Limerick, by reason of his adultery. The respondent had appeared, but had not filed an answer.

*Dr. Wambey* appeared for the petitioner.

*Mr. Herbert*, for the respondent.

The adultery was proved, and the only point raised was, whether the evidence of the marriage in Norfolk Island was sufficient.

Captain Horsley, the petitioner's father, stated :—

“ In 1842 I was stationed with my regiment, her Majesty's  
“ 96th Foot, in Norfolk Island. The respondent was then  
“ holding a Government appointment there. I was present  
“ at his marriage with the petitioner, who is my daughter, and  
“ which took place on the 6th of April, 1842, in a room there  
“ used for the purpose of celebrating marriages. The Divine  
“ Service for civilians was held in this room, but Divine  
“ Service for the troops was held in the barracks. The cere-

“mony was performed by the Rev. Mr. Naylor, a clergyman  
 “of the Church of England, according to the rites and forms  
 “of the Church of England. My daughter and Lord Limerick  
 “afterwards lived together in Norfolk Island and in England  
 “as man and wife.  
 “The signature to the certificate is that of the clergyman  
 “who performed the ceremony. I know his handwriting.”

1863.

February 15.

—  
 The COUNTESS  
 of LIMERICK  
 v.  
 The EARL of  
 LIMERICK.

THE JUDGE ORDINARY: Can you show that the register of which the certificate is a copy was kept in obedience to any law?

Dr. Wambey: No. The Common Law of England, as it existed before Lord Hardwicke's Act (26 Geo. II. c. 33), prevails with regard to marriages celebrated in British Colonies, unless varied by the local legislatures. “*Semper præsumitur pro matrimonio.*” (*Catterall v. Catterall*, 1 Robert. 180.)

THE JUDGE ORDINARY: Can I take judicial notice of the law of a Colony of which there is no evidence? I will consider whether the proof of the marriage is sufficient.

*Cur. adv. vult.*

THE JUDGE ORDINARY: The Marriage Act, 4 Geo. IV. c. 76, has made no alteration in the law as it previously stood with regard to the question under consideration. Norfolk Island is a Colony planted by this country, and the Common Law, therefore, is in force in it. The proof of the fact of the marriage is, therefore, sufficient, and the petitioner is entitled to a decree.

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(*Before the Full Court: THE JUDGE ORDINARY, CHANNELL, B., and  
KEATING, J.*)

1860.

ABBOTT *v.* ABBOTT AND GODOY.

January 20.

*Evidence.—Marriage in Chili.*

ABBOTT

*v.*

ABBOTT AND  
GODOY.

Proof of a marriage in Chili was established by the production of a certified extract of the entry of the marriage in the Marriage Register, proved to be kept in Chili, in compliance with the requirements of the laws of Chili, and to be admissible in evidence in Chili, upon the Court being satisfied of the identity of the parties named in the certificate, and of the curate rector who gave the certificate.

*Dr. Twiss, Q.C., and Dr. Tristram* appeared for the petitioner.

No appearance had been entered by the respondent or co-respondent.

The marriage in this case was celebrated at Santiago, in Chili, and the only point raised was, whether the evidence adduced in support of it was sufficient.

John Sewell stated :—" I was formerly a merchant at Valparaiso. The petitioner and respondent were married at Santiago. I was not present at the marriage, but I frequently saw them before and after the marriage. I first went to Chili thirty-seven years ago. All marriages contracted there are inserted in a parish book; and if a certificate of a marriage is wanted, it can be obtained on request or by petition. I believe it is the law of Chili that a book is to be kept for the purpose of registration, whenever marriages are contracted there. I know as a fact that the register book is kept."



*Dr. Twiss* : The course I propose to adopt will be to satisfy the Court that the register book would be admissible in evidence, if produced from the proper custody, and then to tender an extract from it of the entry of the marriage in question, certified by the officer who has the custody of it. This certified extract will be good evidence under 13 & 14 Vict. c. 99, s. 14.

1860.  
January 20.  
—  
ABBOTT  
v.  
ABBOTT AND  
GODFREY.

THE JUDGE ORDINARY : That section is limited in its application to books or documents that would, *per se*, be evidence in this country when their character is proved. I do not say that if you had the book here, and you proved by proper evidence that it was a book kept in the execution of a public duty by an officer of the Government of Chili, it would not be admissible ; but at all events, before you can prove a copy, you must prove that it is a copy of an instrument that would be evidence in this country, if it were here. It is not sufficient to prove that it would be evidence in a foreign country.

*Dr. Twiss* referred to the *Taff Peerage Case*,\* in which a witness was called conversant with the law of the country in which the marriage was contracted, who stated on oath, from his own knowledge, that by the law, certain books, if produced in a Court of Justice would be received as evidence.

THE JUDGE ORDINARY : It may be, that if the book was kept by a public authority abroad, that would be sufficient. If you could prove that the law of Chili requires every person who celebrates a marriage to make an entry of it at the time, and you produced the book containing an entry of the marriage, and showed that it was made by the proper officer in pursuance of the duty cast upon him by the law, his record of

\* Not reported.

1860. the marriage would be admissible, without calling for evidence  
January 20. that it actually took place.

ABBOTT  
v.  
ABBOTT AND  
GODOX.

KEATING, J. : In *Biddulph v. Lord Camoys*,\* it was necessary to prove a marriage in France, which was celebrated before the Revolution. It was proved by French advocates that registers of marriage were kept at Lille by official authority, and that those registers were authentic documents both before and since the Revolution, and copies of the documents were admitted in evidence.

Witness : "A book is kept in every church. I was married in Chili myself, and my marriage was entered in the same way. The book is in the legal custody of the *curé*, and is kept by the sacristan, who is the *curé's* servant. The *curé*, or rector, is bound to keep it."

A certificate of the entry of the marriage was then put in purporting to be signed by the curate rector, whose signature was certified by a public notary ; the notary's certificate being countersigned by the British Consul in Chili.

THE JUDGE ORDINARY to Witness : This certificate purports to be signed by the rector. Do you know him by name ?

Witness : "I know that there is such a person. The certificate is received as evidence of a marriage in Chili."

THE JUDGE ORDINARY : The fact of its being admissible in foreign courts may be necessary to prove that it is an authorized register to give it a character, but it would not be admissible here simply because it is admissible in foreign courts.†

\* Not reported.

† But see the *Perth Peerage Case*, 2 H. of L. Cases, 873, where

Do you know that Mrs. Abbott is the person described in this certificate ? 1860.  
January 20.

Witness : " I do."

THE JUDGE ORDINARY : Do you know those witnesses whose names are mentioned as being present at the marriage ? ABBOTT  
v.  
ABBOTT AND  
GODOY.

Witness : " I am well acquainted with them."

THE JUDGE ORDINARY : I think that is sufficient.  
*Marriage dissolved.*

(Before the Full Court : THE JUDGE ORDINARY, CHANNELL, B., 1859.  
and KEATING, J.) January 21.

PLUMER v. PLUMER AND BYGRAVE.\*

*Dissolution of Marriage.—Evidence of Recriminatory Charges not pleaded.—Amendment of Answer.—Costs.* PLUMER  
v.  
PLUMER  
AND  
BYGRAVE.

A co-respondent whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the Court to exercise its discretion by withholding a decree ; but upon a statement being made that the co-respondent would probably be able to establish a case of such misconduct on the part of the petitioner if he had the opportunity, the Court allowed him to amend his answer by the insertion of various counter-charges against the petitioner, and reserved the question of the costs of the day until the merits of the case had been ascertained.

a marriage celebrated in France was held to be proved, by putting in evidence examined copies of the register, and upon further proof that the register was kept according to the law of France, and that it would be received as evidence of the marriage in the Courts of that country.

\* Reported by R. Searle, Esq.

1859.  
January 21.

PLUMER

v.

PLUMER  
AND  
BYGRAVE.

Evidence tendered by a co-respondent of declarations by the wife to a third person, when the husband was not present, with regard to the conduct of the husband during cohabitation, is not admissible.

The petitioner, William Plumer, prayed for a dissolution of his marriage with Louisa Plumer, on the ground of her adultery with Henry Bygrave. The respondent did not appear. The co-respondent appeared and pleaded a denial of the adultery.

*Mr. Patchett*, for the petitioner, called witnesses, who proved the marriage in 1838 and cohabitation until 1851.

*Mr. D. Keane*, for the co-respondent, asked one of these witnesses, the respondent's brother, whether the respondent had ever complained to him of the petitioner's cruelty to her.

THE JUDGE ORDINARY: Your answer only traverses the adultery charged in the petition. You do not charge cruelty. And how can you make her declarations evidence against the petitioner?

*Mr. D. Keane* submitted that he was entitled to put questions for the purpose of eliciting that the petitioner had been guilty of misconduct, such as adultery, cruelty, or unreasonable delay, which would induce the Court to exercise its discretion by refusing a decree, notwithstanding the adultery of the respondent. If a decree were made, the co-respondent might be condemned in costs, and he therefore had a right to establish facts which would induce the Court to withhold a decree. Upon the question of his right to give evidence of the respondent's statements to the witness with regard to the conduct of the petitioner, he referred to *Winter v. Wroot* (1 Moody & Robinson, 404), cited in Roscoe's N. P. 563. That was an action for crim. con., in which counsel for the defendant, in cross-examination, asked a witness for the

plaintiff who had been called to prove the terms on which the parties lived together before the alleged criminal intercourse, whether he had ever heard the plaintiff's wife complain of the plaintiff's treatment of her. An objection to this question being made by counsel for the plaintiff, the learned Judge, Lord Lyndhurst, said, "I think the complaints of the wife " are evidence as showing the terms upon which the parties " lived together. That is made up of a number of acts of the " two parties, of which the complaints form part. I think, " therefore, the witness may be asked generally whether the " wife made complaints of the manner in which her husband " treated her." Also *Trelawny v. Coleman*, 2 Starkie, N. P. C. 191.

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January 21.  
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THE JUDGE ORDINARY: In *Winter v. Wroot*, the witness, in his examination in chief, said that the parties had lived harmoniously together. In cross-examination, he was asked whether he had ever heard the wife complain of the husband's conduct. That question was put for the purpose of ascertaining the weight to be given to the statement in the examination in chief; for if he had heard such a complaint, it would have detracted from the value of his evidence as to their having lived together harmoniously. If the ruling cannot be justified on that ground, I cannot but say that I dissent from it.

The question was accordingly withdrawn.

*Mr. D. Keane* then put some questions with the view of eliciting the fact that the petitioner had been guilty of adultery, and referred to a MS. note of *Tollemache v. Tollemache*.\*

\* In *Tollemache v. Tollemache* (tried before THE JUDGE ORDINARY, WIGHTMAN, J., and WILLIAMS, J., on the 8th July, 1859), the petitioner, a husband, alleged that he was, and had been since his birth,

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v.  
PLUMER  
AND  
BYGRAVE.

THE JUDGE ORDINARY: The Court no doubt has jurisdiction to enter into an inquiry whether there are any circumstances which should induce it to refuse a decree; but my impression is, that you have no right to enter into such an inquiry. You would be taking a great advantage of the other

domiciled in England; that he was married to the respondent in Scotland, and afterwards in England; that in 1841 she committed adultery at Glasgow, and that the Scotch Court pronounced a sentence of divorce in consequence of that adultery; and he prayed for a dissolution of his marriage. The respondent, in her answer, traversed the allegation that the petitioner had always retained an English domicile, and alleged that he had acquired a Scotch domicile before the marriage, and retained it until after the Scotch decree of divorce. Issue was joined before a special jury on the question of domicile only. The respondent examined witnesses in support of her allegation, the petitioner examined witnesses in opposition to it, and the jury returned a verdict for the petitioner.

On the 9th July, 1859 (before THE JUDGE ORDINARY, WILLIAMS, J., and MARTIN, B.), the Queen's Advocate (*Sir J. Harding*) and *Mr. Mundell*, for the petitioner, proceeded to examine witnesses to prove those allegations in the petition which had not been traversed by the respondent.

*Dr. Deane*, Q.C. (with him *Mr. J. A. Russell* and *Mr. Kinnear*), for the respondent, objected to one of the questions put to the first of these witnesses in his examination in chief.

THE JUDGE ORDINARY: What is your *locus standi*?

*Dr. Deane*: We have appeared and pleaded, and therefore we do not come within the rule that where a respondent has not appeared and answered, her counsel cannot cross-examine the petitioner's witnesses.

THE JUDGE ORDINARY: Do you apprehend that you have a right to dispute facts which, as far as your client is concerned, are admitted on the record?

*Dr. Deane*: We have a right to cross-examine.

THE JUDGE ORDINARY: If, when the allegations in a petition are uncontradicted on the record, the respondent can controvert them at the hearing, he must have a right to call witnesses as well as to cross-examine.

WILLIAMS, J.: We are of opinion that it is not competent to *Dr.*

side by eliciting evidence of matters which you have not pleaded, and of which they have had no notice.

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*Mr. D. Keane* : A petitioner should be prepared to stand the test of an inquiry into all these matters without notice.

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BYGRAVE.

THE JUDGE ORDINARY : A petitioner should be prepared to prove all that is necessary to entitle him to a decree.

Deane to cross-examine the petitioner's witnesses, or in any way to dispute the facts which his client has admitted on the record.

After evidence had been given of the allegations in the petition, a witness was called to explain the delay that had taken place, since the adultery was committed, in the institution of proceedings for a divorce in England.

WILLIAMS, J. : It is competent to Dr. Deane to raise a question as to the propriety of a decree being granted by the Court, but he must assume that the case of the petitioner has been made out to the satisfaction of the Court; that is to say, that the facts which are not denied on the record have been proved. He may therefore put questions to this witness, and address the Court.

At the conclusion of the witness's examination,

WILLIAMS, J., said,—We think the petitioner should be called for the purpose of being examined by Dr. Deane.

*Dr. Deane* said he did not wish to examine him. He then addressed the Court upon the questions of unreasonable delay and of the effect of the Scotch divorce.

The Court finally dissolved the marriage.

And in *Parker v. Parker and M'Leod*, tried on the 9th July, 1859, before THE JUDGE ORDINARY, WILLIAMS, J., and MARTIN, B., the petitioner prayed for a decree of dissolution on the ground of his wife's adultery. The respondent did not traverse the adultery, but pleaded connivance. Issue was joined on this plea by the petitioner. The respondent began and examined witnesses in support of the plea, but the jury found that it had not been established.

*Pigott*, Serjt., and *Dr. Spinks*, for the petitioner, then called witnesses in support of the allegations in the petition which had not been traversed.

*Dr. Swabey* for the respondent.

*By the Court* : Dr. Swabey is precluded from interfering with regard

1859.  
January 21.

PLUMER  
v.  
PLUMER  
AND  
BYGRAVE.

But he cannot come prepared to disprove the statements of his own witnesses. By traversing adultery on the record, and not pleading anything else, you lead him to believe that adultery is the only question you will raise.

After conferring with the other learned Judges,

THE JUDGE ORDINARY said,—I do not think it would be at all a proper course to allow any of the parties to the record as a matter of right to cross-examine the petitioner's witnesses in the manner you propose when the pleadings are in this state. The Court may examine any witnesses brought before it to elicit information which may guide it in the exercise of its discretion, and it cannot be precluded from entering into any inquiry by the pleadings which the parties may have thought fit to put on the record. In many cases, facts have been elicited by the Court which not only justified it in refusing, but made it incumbent on it to refuse a decree, although both parties were anxious to obtain it. In one remarkable case, although there was no plea of collusion, facts were elicited which established collusion, and the petition was dismissed, to the great mortification no doubt of the three parties to the suit.\* But it would be very improper to allow a party to the suit, who had simply pleaded a denial of one of the facts alleged in the petition, and had thereby given notice to the petitioner that that fact only would be contested, to spring a mine upon the petitioner at the hearing, by eliciting evidence of some counter-charge which the petitioner might perhaps have been prepared to meet if he had

to those matters which have not been traversed on the record; but he will be allowed to interfere with regard to any matters which go to the discretion of the Court as to withholding a decree.

The marriage was dissolved.

\* *Lloyd v. Lloyd and Chichester*, ante, p. 39.



had notice of it. At the same time, when it is intimated to the Court that there are facts in a case which ought to be brought before it, and that they can be proved by one of the parties if an opportunity is afforded him, the Court is very reluctant to proceed and determine the case in the dark. We therefore think the co-respondent ought now to be allowed to plead the facts which he thinks he has the means of proving.

1859.  
January 21.

PLUMER  
v.  
PLUMER  
AND  
BYGRAVE.

*Mr. D. Keane* said, the co-respondent had been managing his own case, and it was not until two or three days ago that the papers were handed to his attorney.

*Mr. Patchett* applied for the costs of the day.

*Mr. D. Keane* : The question of the costs of the day should be reserved until the whole case is before the Court.

THE JUDGE ORDINARY : These cases are not like ordinary *nisi prius* causes. It is for the interest of public morality that the Court should not proceed to a decree when there appear to be circumstances which ought to be inquired into. I can see no injustice in allowing the answer to be amended, and in making the costs depend upon the merits of the parties.

Leave was accordingly given to the co-respondent to add to his answer charges of adultery, cruelty, connivance, and condonation against the petitioner, the amendment to be made within a week ; and the question of costs was reserved.

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1861.

November 5.

WALKER

v.  
WALKER,  
NICOLL,  
AND  
CRAIG.

WALKER v. WALKER, NICOLL, AND CRAIG.

*New Trial.—Verdict against two Co-respondents.*

Where there is a verdict against two co-respondents, and the Court is dissatisfied with the verdict against one only of the two co-respondents, it will grant a new trial as to both.

*Semble*, If the petitioner will allow a verdict to be entered for the co-respondent applying for a new trial, the Court may grant the decree.

In this case the jury found that the respondent had been guilty of adultery with both of the co-respondents, and a decree *nisi* was pronounced.

*Mr. J. D. Coleridge*, Q.C., on behalf of the co-respondent Nicoll, moved for a new trial, on the ground that the verdict was against the weight of the evidence, etc.

*Dr. Phillimore*, Q.C., for the petitioner, moved, notwithstanding this application, for the decree *nisi* to be made absolute. If Nicoll was struck out altogether, the petitioner would still be entitled to a decree.

THE JUDGE ORDINARY: I cannot grant a partial new trial. If I grant a new trial at all, it must be on the ground that the jury made a mistake. If the verdict is wrong as to one of the co-respondents, and if I grant a new trial, there must be a new trial as to both. If the petitioner were to consent that the verdict should be entered for the co-respondent Nicoll, and were content to rely upon the verdict against the other co-respondent, I might possibly make the decree.

The motion for a new trial was subsequently refused, and the rule *nisi* was made absolute.

(Before THE JUDGE ORDINARY.)

BEVAN v. BEVAN.

1859.

December 7.

BEVAN  
v.  
BEVAN.

*New Suit.—Dissolution of Marriage.—Second Petition.—  
22 & 23 Vict. c. 61, s. 6.*

A wife had filed a petition for a dissolution of marriage, on the ground of adultery, coupled with desertion and cruelty. The case was tried before the passing of the 22 & 23 Vict. c. 61, which renders the wife competent to give evidence of desertion and cruelty. The full Court refused to dissolve the marriage, on the ground that there was not sufficient evidence of desertion and cruelty, but pronounced a decree of judicial separation, on the ground of adultery. After the passing of the 22 & 23 Vict. c. 61, the Petitioner applied for leave to file a second petition for a dissolution of marriage, containing the allegations that she had before failed to establish. The Judge Ordinary granted leave, but expressed a strong opinion that the full Court would refuse to re-hear the case.

On the 16th of August, 1858, Amelia Bevan filed a petition for dissolution of marriage, on the ground of adultery, coupled with cruelty and desertion. On the 30th of June, 1859, the case was heard by the full Court. The Court, not being satisfied with the evidence of desertion or of cruelty, refused to dissolve the marriage, but pronounced a decree for judicial separation on the ground of adultery.

*Dr. Spinks* now moved that she might have leave to file a petition for dissolution of marriage, containing the same allegations of adultery, as well as of cruelty and desertion, as were in the former petition. She would be able to establish those allegations by her own evidence under the 6th section of 22 & 23 Vict. c. 61. At the hearing of the former petition she was not a competent witness.

1859. THE JUDGE ORDINARY: If your object is to ascertain the  
 December 7. impression now upon my mind as to the result, I do not hesi-  
 BEVAN  
 v.  
 BEVAN. tate to say that if such a petition were brought before the full  
 Court they would dismiss it. In former days, many trials in  
 the Common Law Courts took place when the evidence of the  
 parties was excluded, and judgment was pronounced on the  
 evidence then laid before the jury. I never heard that, after  
 the alteration in the law by which parties were allowed to be  
 examined in their own behalf, fresh actions were brought for  
 old causes of action which had before been adjudicated. It  
 appears to me, therefore, that this case, the party having had  
 her petition for a dissolution of marriage heard, is *res judi-*  
*cata*. Such is my impression, but I do not refuse you per-  
 mission to file the petition. *Application granted.*

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1862. POLLOCK v. POLLOCK, DEAN AND MACNAMARA (The Queen's  
 November 11. Proctor intervening).

*Queen's Proctor—Intervention after Decree Nisi.*

POLLOCK  
 v.  
 POLLOCK,  
 DEAN AND  
 MACNAMARA.  
 (the Queen's  
 Proctor  
 intervening).

Where the Queen's Proctor has intervened after the decree *nisi*, and the attendance of the petitioner at the hearing is necessary for the purpose of proving his identity, the Court will order the proceedings to be stayed until his appearance.

Query, whether the Court has power to order the petitioner to attend under section 43 of the Divorce Act, when the Queen's Proctor has intervened after the decree *nisi*?

The Queen's Proctor had obtained leave to intervene in this suit after the decree *nisi* was pronounced, and had filed pleas alleging Collusion and Condonation.

*Dr. Spinks* (for the Queen's Proctor) moved that the hearing should be postponed until next term, and that the peti-

tioner should be ordered to attend at the hearing. An affidavit had been filed by the Queen's Proctor that his presence was necessary for the purpose of identification. He cited *Marris v. Marris and Burke*, 31 L. J. (P. & M.) 69.

1862.  
November 11.

POLLOCK  
v.  
POLLOCK,  
DEAN AND  
MACNAMARA  
(the Queen's  
Proctor  
intervening).

THE JUDGE ORDINARY: In that case the Queen's Proctor intervened before the hearing of the petition, and his case and the petitioner's was heard at the same time, and the order was made under the 43rd section of 20 & 21 Vict. c. 85. I doubt whether the power given by that section extends to proceedings under 23 & 24 Vict. c. 144, s. 7, unless the Queen's Proctor intervenes and becomes a party whilst the suit is pending. In this case the hearing of the petition has taken place, and the case now assumes a *quasi* criminal aspect. I will help you in this way. I will order that the proceedings in the suit be stayed until the petitioner appears. You may hereafter renew your application.

The order made was in these terms: "Upon hearing counsel for the Queen's Proctor, the judge directed the proceedings to be stayed until the appearance of the petitioner."

(Before the Full Court: THE JUDGE ORDINARY, WIGHTMAN, J., and BYLES, J.)

1859.

November 25  
and Dec. 7.

MIDGELEY (falsely called Wood) v. Wood.\*

*Nullity of Marriage.—Undue Publication of Banns.—4 Geo. IV. c. 76, ss. 7 and 22.—Costs.*

MIDGELEY  
(falsely called  
Wood)  
v.  
WOOD.

A marriage by banns, where by the consent of both parties the name of the man was falsely stated to be "John," his baptismal name being "Bower" only, was declared null and void.

\* Reported by R. Searle, Esq.

1859. The man was condemned in costs because he induced the woman to consent to the undue publication by telling her that it would not render the marriage invalid.
- November 25 and Dec. 7.
- MIDGELEY  
(falsely called  
Wood)  
v.  
WOOD.
- Query, whether a respondent in a suit of nullity by reason of undue publication of banns, who pleaded in confirmation of the petition, would be precluded by the dismissal of that petition from presenting another founded upon the same allegations?

The petitioner, Margaret Midgeley, prayed to have a marriage *de facto* between herself and the respondent, Bower Wood, declared null and void, alleging that there was no due publication of the banns, the respondent being called John instead of Bower, with the knowledge of both parties, for the purpose of concealment. The respondent pleaded that at the time of the publication the petitioner assented to the use of a false name knowing its purpose.

The banns were published on the 28th of March, 4th of April, and 11th of April, 1852, and the *de facto* marriage was celebrated on the 12th of April, 1852, at Manchester. Miss Midgeley was described in the register as a spinster aged 20, and Mr. Wood as a bachelor aged 22. The publication in the false name of John was for the purpose of concealing the marriage from the grandfather of Wood, upon whom (his father and mother being dead), he was dependent. A short time after April, 1852, the grandfather became acquainted with the fact of a marriage, but the certificate was shown to him to induce him to believe that the John Wood who had been married was not the same person as his grandson Bower Wood. Soon after the marriage the respondent entered the Military Academy at Chelsea, to qualify himself as an army schoolmaster, and he passed as a single man until 1853. The petitioner saw him in 1853, but from 1854 to 1858 there was no communication between them. Upon his recommendation she engaged herself as a domestic servant, and so maintained herself. In 1858 Wood was a pay-clerk at Chatham, and had a small farm in the neighbourhood. In 1855 the grandfather had

died, and left him by will £1000 and an annuity of £50, which in the event of his death, bankruptcy, or insolvency, was to go to his wife if he were married. 1859. November 25 and Dec. 7.

*Dr. Deane, Q.C. (Mr. J. D. Coleridge with him), for the petitioner, cited Wiltshire v. Prince (3 Hag. Ec. 332); Wright v. Elwood (1 Cur. 662); Tongue v. Tongue (1 Moore's P. C. 90), and 4 Geo. IV. c. 76, ss. 7 and 22.\**

MIDGELEY  
(falsely called  
WOOD)  
v.  
WOOD.

Margaret Midgeley, the petitioner, was examined: It was after the first publication of the banns, but before the marriage, that Wood told me his real name. He had said before that his name was John Philip Bower Wood. After the marriage I sometimes called him John, but I generally called him Philip. He promised to introduce me to his grandfather, but he never did. I spoke to him several times about his name, because I thought that John was not his real name.

\* 4 Geo. IV. c. 76, s. 7.—“ Provided always, and it is hereby further enacted, that no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns, respectively deliver or caused to be delivered to such parson, vicar, minister, or curate a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively.”

4 Geo. IV. c. 76, s. 22.—“ Provided always, and be it further enacted, that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.”

1859. I asked him if the marriage would be legal in that name if it were not his real name, and he said "Yes." I objected to it, and it was a long time before I would consent to marrying him in that name. He said I must marry him, and trust in him afterwards.

November 25  
and Dec. 7.

MIDGELEY  
(falsely called  
Wood)  
v.  
Wood.

*Dr. Phillimore*, Q.C. (for the respondent), applied for leave to cross-examine the petitioner. The respondent had pleaded in confirmation of the petition; but there was no collusion. He had no desire whatever to continue his connection with the petitioner. He had not heard of her for a number of years, and imagined that she was dead, but in 1858 he was disagreeably reminded of her existence, and this suit was soon afterwards instituted. The petition originally alleged that only one party was cognizant of the fraudulent publication, and therefore it was demurrable. The greatest doubt was entertained by the respondent's advisers whether the petition had been drawn up in that form intentionally, in order that there might be a failure of proof and a decree in favour of the marriage, or whether it was a *bond fide* error. The respondent then, as now, wished the marriage to be set aside, on the ground of the undue publication of banns, and he was therefore advised to plead the knowledge of both parties. Subsequently the petition was amended and the plea was unnecessary, but stood as a confirmation of the petition. Both parties were equally anxious for the success of the suit. He proposed to cross-examine the petitioner, and afterwards to examine the respondent, if necessary, in support of his plea. He was not aware of any precedent for such a state of the pleadings in a suit for nullity.

THE JUDGE ORDINARY: The point is of great importance. You desire not only to question the petitioner, but to tender affirmative evidence for the respondent. Suppose the petition should ultimately be dismissed, would that decree be



binding on both parties for the future? If a suit had been instituted in the Ecclesiastical Court for nullity, on this ground of undue publication, and the husband had appeared and given in an answer to the libel, confessing the different articles alleged, and then, the witnesses having been examined, the Ecclesiastical Court had dismissed the suit, could the husband afterwards have instituted a suit for nullity?

1859.

November 25  
and Dec. 7.

MIDGELEY  
(falsely called  
Wood)

v.  
Wood.

*Dr. Phillimore*: I am inclined to think it would have been *res judicata*.

*Dr. Deane* was of the same opinion.

THE JUDGE ORDINARY: I should like to hear the question discussed on the part of the husband. If this petition were to result in a decree refusing a declaration of nullity, and that decree were to be binding upon both parties, it would tend to support the view that the respondent should be at liberty to call affirmative evidence. Otherwise, the wife might institute a suit of this description and procure a decree which would be binding upon him. At all events you may cross-examine this witness *de bene esse*.

Margaret Midgeley was accordingly cross-examined by *Dr. Phillimore*: I last saw the respondent in 1854; I occasionally received 10s. a week from him, but never after he came to reside in London. I was quite aware before the publication that the name was changed in order to conceal the marriage. I do not know whether I was aware of it before the first publication or not.

*To the Court*: My object in presenting the petition is to know whether my marriage is legal or not. I made inquiries for Wood after he left Chelsea, but I could not ascertain what had become of him, until just before this petition was presented. My relations wanted me to see whether I was married or not. A clergyman in Yorkshire was very anxious to know whether the marriage was legal.

1859. A witness proved that the respondent was baptized in the name of Bower only.

November 25  
and Dec. 7.

MIDGELEY  
(falsely called  
WOOD)  
v.  
WOOD.

THE JUDGE ORDINARY delivered judgment: It is unnecessary to say anything about the cross-examination of the petitioner. Independently of that, the allegations in the petition are established. There is ample authority for saying that a party to a fraud of this sort may by law come forward and avail herself of the wrong done, so as to get the marriage voided. Where parties marry, knowing that there is not a due publication of banns, the marriage is null. Although in this case the woman might suppose that John was one of the man's names, and might believe it sufficient to make the marriage a good one; yet at the same time she knew it was not a proper publication of both his Christian names. As to the time when she became cognizant of the fact, she states that it was communicated to her before the banns were put up, and, at all events, she must have known it before the marriage. If she intermarried under those circumstances, that is sufficient. The Court pronounces the marriage null.

*Dr. Deane* applied for costs.

WIGHTMAN, J.: They are both equally to blame.

THE JUDGE ORDINARY: The Court will consider the question of costs.

December 7.

THE JUDGE ORDINARY: This case stood over upon a question of costs. It was a suit by a woman for a declaration of nullity of marriage in consequence of a fraud perpetrated by both parties to the marriage, by putting up banns in a false name. It was suggested that the Court was bound to grant costs to the petitioner, according to the usual practice in the

Ecclesiastical Court. But I think I am not bound to grant costs to her upon any such principle. She is not a wife, and she never was a wife. The marriage was null from the beginning. But there is another ground upon which I think I ought to grant her costs. It appeared that the respondent allured the woman into this form of marriage, by telling her that it would be a good marriage, and so did her a grievous wrong. She supposed that she should become his wife. She consented to the use of the false name, thinking that it would be a good marriage. He led her into a most distressing position, and she said, very naturally, "I was strongly urged "not to remain in this doubtful state, but to have it ascertained whether I was a wife or not." The Court will therefore grant her costs.

Marriage declared null and void, with costs against the respondent.

1859.  
December 7.  
MIDGLEY  
(falsely called  
WOOD)  
v.  
WOOD.

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GAPP v. GAPP AND LEVERSON.

*Practice.—Heading of Affidavit verifying Petition.*

The affidavit verifying the petition should be headed "In the matter of the Petition of A. B."

1859.  
March 24.  
GAPP v. GAPP  
AND  
LEVERSON.

The proposed petitioner in this case had filed a petition for the dissolution of his marriage, with an affidavit verifying the same, the affidavit being headed C. Gapp v. A. J. Gapp and Leverson. The registry had refused to issue a citation without the directions of the Court.

*Dr. Waddilove* moved for the citation to issue.

THE JUDGE ORDINARY: I think the affidavit should be re-

1859.

March 24.

—  
GAPP v. GAPP  
AND  
LEVERSON.

sworn. At present it is entitled in a cause which is non-existent. Until a citation has issued, I think that the affidavits should not be entitled in a cause, and should be sworn either without a heading or "In the matter of the Petition of A."

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1861.

Nov. 26.

—  
WATTS  
v.  
WATTS.

WATTS v. WATTS.

*Practice.—Two Motions for Attachment for Non-payment of Money.—Costs for one only allowed.*

An application for an attachment against a husband for non-payment of alimony and costs should be made in one motion. The costs for two motions will not be allowed against the husband.

Two cases for motion were filed in this case, one for an attachment against the husband for non-payment of alimony, the other for an attachment against him for non-payment of costs.

*Dr. Spinks* moved in each case.

THE JUDGE ORDINARY: The attachment may issue, but the husband ought not to be burdened with the expense of two motions. The application should have been made in one motion, the ground of both motions being the non-payment of money.

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COTTON v. COTTON AND KINNIS.

1862.

Dec. 2.

*Practice.—Name of Co-respondent mis-spelt in Citation.—  
Fresh Citation.*

COTTON v.  
COTTON AND  
KINNIS.

Where co-respondent's name had been mis-spelt in the citation served,  
the Court made an order for a fresh citation to issue.

The respondent and co-respondent had been served with a  
citation in this cause, but the co-respondent's name had been  
mis-spelt "*Kennis*" in the citation.

*Dr. Wambey* moved that the service of such citation should  
be deemed sufficient service, or that the petitioner might ex-  
tract a fresh citation.

THE JUDGE ORDINARY: I cannot make an order that the  
service of the citation is sufficient. You may take a fresh  
citation.



# INDEX TO THE PRINCIPAL MATTERS.

## INDEX TO PROBATE CASES.

### ADMINISTRATION.

#### 1. *Administration to Creditor.—Original Citation not forthcoming.*

When the estate of the deceased, who died without any known relation, was barely sufficient to pay his liabilities, and a citation had been issued and served on behalf of a creditor upon the Queen's Proctor and by advertisement, but had been lost or destroyed by his solicitor's clerk, who had absconded for embezzlement, the Court dispensed with the rule requiring the citation to be returned into the Registry, and made the grant of administration to the creditor.—*Mason v. The Next of kin of William Robinson*, 43.

#### 2. *Administration to a Creditor.—Substitution of one Creditor for another.—Costs.—Practice.*

The Court will make a grant of administration to a creditor who has been substituted for the creditor who extracted the citation, and will allow the latter such costs as he necessarily incurred prior to the former one taking up the application.—*Andrews v. Murphy*, 198.

#### 3. *Administration.—Parties Entitled Abroad.—Power of Attorney.—Section 73 of Probate Act.*

Where the party solely entitled to the grant of administration of the estate of the deceased was abroad, and it was not known where she was, or when she would return to this country, and there was a sum of money payable to the estate of the deceased, the Court made a grant of administration under the 73rd section of the Probate Act to a person whom she had duly authorized by power of attorney to manage her property in England.—*In the goods of Bickham Sweet Escot*, 186.

#### 4. *Administration.—Practice.—One of Next of kin of full age, but abroad.—Limited Grant to the Guardian of the others, who were Minors.—Sect. 73 of Probate Act.*

A. died intestate, leaving four children, of whom one was of age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the Court, under the 73rd section of the Probate Act, granted administration to the duly elected guardian of the

ADMINISTRATION—*continued.*

minors for their use and benefit, limited until one of the children should apply for a grant.—*In the goods of Burgess* (deceased), 188.

5. *Administration.—Prior Petens.—Affidavits in Reply.—Practice.* *Cæteris paribus*, the male is preferred to the female, in a contest for a grant of administration; but the female, when with the consent of the male she is *prior petens*, is preferred to the male, who afterwards opposes her taking the grant. The Court will allow affidavits in reply to be read at the hearing of a cause, if it thinks such affidavits are necessary.—*Cordeux v. Trasler*, 48.

## ADMINISTRATION BOND.

1. *Administration Bond.—Excessive Penalty by Mistake.—Cancellation of Bond.*

Where, under a misapprehension as to the value of the personal estate of an intestate, the penalty of an administration bond was too large, the Court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the Registry to be cancelled.—*In the goods of Goold* (deceased), 20.

2. *Administration Bond.—Married Woman.—Husband's Refusal to execute Administration Bond.*

Where a married woman is entitled to administration, and the husband refuses to join in the administration bond, or to assist his wife in obtaining the administration, the Court will grant the administration to her, allowing a third person to execute the bond for her.—*In the goods of Stewart Sutherland* (deceased), 189.

## ALTERATIONS IN WILL.

*Alterations.—Probate.—Will made before January, 1838.—Unattested Alterations.—Presumption of date of Alterations.*

Unattested alterations appearing in a will executed prior to the Wills Act (1 Vict. c. 26) coming into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the Act came into operation, and are therefore entitled to probate.—*In the goods of George Streaker* (deceased), 192.

## CITATION.

1. *Citation against Heir-at-law.—Suit commencing with Caveat.—Probate Act, s. 61.*

Where a suit has been commenced with a caveat, and the defendant had filed no plea to the declaration propounding the will, a citation may issue against the heir-at-law, under the 61st section of the Probate Act.—*Domvile and others v. Domvile*, 17.

2. *Service of Citation by Advertisement.—Jurisdiction.—Affidavit of Property in England.*

When a wife and husband resident abroad have been served with a cita-



CITATION—*continued.*

tion by advertisement, there should be an affidavit that neither of them has any agent in this country. Where the party in respect of whose estate a grant is asked for died abroad, there should be an affidavit that he left personal property in England, otherwise the Court has no jurisdiction to make the grant.—*Evans v. Burrell*, 185.

3. *Will affecting Real Estate.*—*Bastard.*—*Citing Queen's Proctor.*—*Section 61 of Probate Act,*

When the will of a bastard affecting real estate is propounded, if such real estate would devolve on the Crown in case of an intestacy, the Queen's Proctor may be cited to intervene in respect of the real estate.—*Wyman v. Ashwell*, 196.

4. *Will.*—*Real Estate.*—*Same Person Legatee and Devisee.*—*Will propounded by her as Legatee only.*—*Cited as Devisee.*—*Sections 61 and 63 of Probate Act.*

Where the same person was a legatee and devisee under a will, and propounded the will in her character of legatee only, the Court allowed her to be cited to see proceedings as devisee.—*Emberley v. Trevanion*, 197.

COSTS.

1. *Earlier and later Wills.*—*Executors.*—*Costs.*

Where the executors of an earlier will, being disinterested persons, opposed on reasonable grounds a will of later date, and the verdict of the jury established the later will, the executors of the earlier will were held to be entitled to their costs out of the estate of the deceased.—*Foale v. Trethewy*, 201.

2. *Proof in Solemn Form.*—*Costs.*—*Executor of Previous Will.*

An executor of a former will has the same right as a next of kin to put an executor of a later will upon proof in solemn form, and to interrogate his witnesses, without being liable for costs.—*Boston v. Fox*, 199.

3. *Costs.*—*Revocation of Administration.*—*Proof in Solemn Form.*

After a next of kin had taken out administration, a will was propounded by one of the residuary legatees. The Court pronounced for the will, but allowed the costs of the next of kin in obtaining administration, and in putting the residuary legatee upon proof in solemn form, out of the estate, as the residuary legatee did not produce the will until after administration had been taken out, and several months after the testator's death, although he was several times desired by the next of kin to produce it if it existed, and he gave no explanation of the delay.—*Smith v. Smith*, 3.

DEPENDENT RELATIVE REVOCATION.

1. *Dependent Relative Revocation.*—*Will.*

The Court refused to apply the doctrine of dependent relative revocation to a case where the deceased had destroyed a will through a mistaken

DEPENDENT RELATIVE REVOCATION—*continued.*

notion of the legal effect of its destruction, as it was satisfied that he intended entirely to revoke that will.—*Dickinson v. Swatman*, 205.

## DISSOLUTION OF MARRIAGE.

*Marriage and Decree of Dissolution in Cape of Good Hope.—Second Marriage.—Right of Widow to Administration in England.*

A., born in Ireland, resided in Cape of Good Hope, first, in her Majesty's Forty-fifth Regiment of Foot, and afterwards in the Cape Mounted Rifles, from 1842 till 1862. In 1850 he married B., resident in the colony; in 1852 the Colonial Court decreed a dissolution of that marriage; in 1856 A. married C., B. still living. A. died in 1863 intestate; and, on a question as to the right to letters of administration raised between C. and the brother and next of kin of A.: The Court held, that C. was entitled to administration as the widow of A.—*Argent v. Argent*, 52.

## EVIDENCE.

*Attesting Witnesses, Examination of.—Practice.*

Where the party propounding a will in a contested suit, the only issue being due execution, and notice under the 41st rule having been given, called one of the attesting witnesses, who gave evidence against the due execution, the Court held that he was bound to call the other attesting witness.—*Owen v. Williams*, 202.

## EXECUTION.

1. *Execution of Will.—Testator's Signature.—Foot or End.*

A testator wrote a will on three sides of a sheet of note paper. The attestation clause and names of the attesting witnesses were at the bottom of the second side; a dispositive clause was written on the third side, and all the letters of the testator's signature, excepting the two last, which extended over to the third side, were on the second side. Held, to be a good execution.—*In the goods of James Powell* (deceased), 34.

2. *Signature "beside the end of the Will."*—15 & 16 Vict. c. 24.

When the dispositive part of a codicil, written on a sheet of note paper, occupied nearly the whole sheet, and the names of the attesting witnesses were subscribed at the bottom of the page, and the signature of the testator was written down the lower part of the edge of the paper: the Court held it to be a valid execution within the 15 & 16 Vict. c. 24.—*In the goods of William Jones*, 1.

3. *Will.—Position of Signature.*—15 & 16 Vict. c. 24, s. 1.

A will filled two pages of a sheet of note paper, leaving no room on the second page for the signatures of the testator and attesting witnesses, which were written along the sides of the will upon the third page. Held, to be a due execution.—*In the goods of Wright*, 35.

**EXECUTION**—*continued.*

4. *Probate.—Re-execution.—Attestation.*

A testator having made some alterations in a duly-executed will, he and the attesting witnesses traced their former signatures with a dry pen, and the attesting witnesses placed their initials in the margin opposite each of the alterations. The Court refused to regard the initials in the margin as evidence that the alterations had been duly executed and attested, and declined to grant probate of the will with alterations.—*In the goods of William Fairlie Cunningham* (deceased), 194.

5. *Will.—Execution.—Several Sheets of Paper.—Signature at Foot or End.*

Deceased signed his name on five sheets of a testamentary paper, which consisted of six sheets; the names of the attesting witnesses appeared on each of the five sheets; on the sixth appeared a testimonium and attestation clause, and the names of the witnesses, but not the signature of the deceased; the writing at the end of the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet. The Court refused to grant probate of the five sheets as containing the last will and testament of the deceased.—*Sweetland v. Sweetland*, 6.

6. *Will.—Execution.—Attestation Clause.—Evidence of Attesting Witnesses.*

Where the evidence of the attesting witnesses directly negatives due execution, such evidence not being rebutted either by direct or circumstantial evidence, and the veracity of the witnesses is unimpeached, the Court cannot, by reason of a formal attestation clause, and on the presumption *omnia esse ritè acta*, pronounce for the will.—*Croft v. Croft*, 10.

**EXECUTOR.**

1. *Probate of Copy of Will.—Executor cited.—Non-appearance.—21 & 22 Vict. c. 95, s. 16.*

An executor who has been cited to take probate of a missing will, and has not appeared to such citation, is barred from taking probate of the original will, when found.—*Davis v. Davis*, 208.

2. *Chain of Executorship.—Power.—Married Woman.*

The chain of executorship is not continued by the appointment of an executor by a married woman in a will made under a power.—*In the goods of John Hughes* (deceased), 209.

**FOREIGN WILL.**

*Foreign Will.—Probate in Common Form.*

Probate in common form of a will alleged to be valid by the law of a foreign country will be granted, on *prima-facie* proof that the foreign Court has adopted it as a valid testament; but the certificate of a notary public, referring to some act of a foreign Court, is not sufficient.

FOREIGN WILL—*continued.*

cient. The prayer for probate may also be supported on another ground, viz., on the affidavit of a skilled person as to the validity of such a paper by the law of the foreign country, and on an affidavit as to the domicile of the deceased.

Where a translation of a will, originally written in English, has been proved in the Court of a foreign country, and probate is asked here on that ground, a re-translation of the translation is the proper document to produce in this Court: but if proof of the validity of the paper by the law of the foreign domicile is relied on, then the original, or a copy of the original, should be before the Court.—*In the goods of Thérèse Henriette Aimée Deshais* (deceased), 13.

## HEIR-AT-LAW.

*Probate Act, 20 & 21 Vict. c. 77, ss. 61 and 63.—Heir-at-law.—Caveat.—Declaration.—Costs.*

An heir-at-law who has not been cited, cannot, by entering a caveat, prevent the executors of a will affecting realty from obtaining probate in common form. If the heir-at-law has entered a caveat under those circumstances, it is not necessary for the executors to declare.—*Young and another v. Ferrie and others*, 210.

## INCONSISTENT WILL.

*Inconsistent Wills of same Date.—Execution by Mistake.*

A testatrix duly executed two inconsistent wills bearing the same date, and written on different sides of the same sheet of paper. Evidence was admitted to show that the deceased signed one of them only as her will, and signed the other by mistake. The Court granted probate of the paper signed by the testatrix, with the intention, that it should operate as her will, and not of the other paper.—*In the goods of Elizabeth Nosworthy* (deceased), 44.

## INCORPORATION.

*Incorporation.—Schedule written subsequent to Execution of Will, but prior to Execution of Codicil.—Probate.*

A testatrix having directed her executors in her will to distribute certain articles according to any list or lists signed by her, and having prior to the execution of a second codicil, signed a list to which no reference was made in the second codicil, the Court, upon the authority of the case *In the goods of Hunt*, allowed the list to be included in the probate.—*In the goods of Mary Ann E. Stewart* (deceased), 211.

## INTERMEDDLING.

*Intermeddling with the Estate by Administrator.—Administration with Will annexed.*

An administrator with the will annexed cannot be forced to take out administration with a later will annexed, when the first administration

INTERMEDDLING—*continued.*

is revoked, although he has intermeddled with the estate.—*In the goods of David Davis* (deceased), 213.

MARRIED WOMAN.

1. *Will.—Wife of convicted Felon.*

The wife of a convicted felon is a *feme sole* as to the power of disposing by will at least of property acquired after her husband's conviction.—*In the goods of Coward*, 46.

2. *Wills made under different Powers by a Married Woman—Effect of general Revocatory Clause in later Will.*

A *feme covert* made two wills during different covertures, the one in 1848 under one power, and the other in 1857 under another power. The latter will contained a general revocatory clause, but did not refer to the previous will or to the power under which it was made: Held that the will of 1848 was entitled to probate.—*In the goods of Hannah Joys*, 214.

3. *Married Woman.—Will.—General Grant of Letters of Administration, with Will annexed, to the Executors of a married Woman.—Revocation of previous Limited Grant.*

Where a married woman who, with her husband's consent, had made investments in her own name, and had made a will in his life disposing of property over which she had a power of appointment, and of all her other property, and her husband had, in writing, consented to and approved of the said will, and the wife died in the husband's lifetime,—the Court revoked a limited grant made to the wife's executors, and decreed a general grant of administration with the will annexed to them, upon the consent of the personal representative of the husband to such grant being filed.—*In the goods of Eleanor Reay* (deceased), 215.

MILITARY WILL.

1. *Military Will.—Practice.—Rules for Non-contentious Business, R. 59 (1857).*

Where a will made by a soldier while engaged on active military service was signed by his mark, before the will can be proved an affidavit must be filed in the Registry in compliance with the Rules, that the deceased had at the time of its execution a knowledge of its contents.—*In the goods of William Hackett* (deceased), 220.

2. *Military Will.—Proof of Signature of Testator.—Rules.—Practice.*  
Where a will made by an officer whilst engaged on active military service was signed by him, but not attested, the Court required, in accordance with the practice of the Registry, that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, and that the form for an affidavit given in the Rules

MILITARY WILL—*continued*

should be strictly followed. — *In the goods of Glastonbury Neville* deceased, (218).

## PLEAS.

1. *Pleas.—Interveners.—Practice.*

A party cited to see proceedings, who has appeared and opposes a testamentary paper, is not allowed to adopt the pleas of the defendant, but should file pleas on his own behalf. — *Jones v. Williams and others*, 19.

2. *Plea.—Undue Influence.—Practice.*

A plea alleging undue influence, without naming any person by whom the undue influence has been exercised, must be amended. But a plea alleging undue influence by A. B. and others is a sufficient plea, though the other party would be entitled to particulars of the "others" on summons. — *West and Nicholl v. West*, 22.

## PROBATE.

1. *Probate.—Draft of Destroyed Will.*

The Court will not admit the draft of a will, which has been inadvertently destroyed, to probate on motion. — *In the goods of Body*, 9.

2. *Probate of Two Testamentary Papers.—Mistake.—Admissibility of Parol Evidence.—Testamentary Papers not inconsistent with each other.—The first not revoked by the last.*

A testator, having erased a clause in his will after the execution, asked a friend to make a fresh copy of the will, omitting the erased clause. The copy was made, but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both wills having remained in his custody up to that time. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed, as together containing the deceased's last will and testament. — *Birks v. Birks*, 23.

## SURVIVORSHIP.

*Survivorship.—Presumption.—Testator and Legatee drowned at same time.*

Where the testator and his residuary legatee have been drowned at the same time in the same ship, the legacy is extinguished, and the grant will be made as in the case of an intestacy. — *In the goods of Carmichael* (deceased), 224.

## TRIAL.

*Trial by Jury.—Interest Suit.—Pedigree.*

In an interest suit in which a question of illegitimacy was raised between a person claiming to be the lawful nephew and next of kin of a deceased

**TRIAL**—*continued.*

intestate, and the Queen's Proctor, the Court directed the issues joined to be tried by a jury, on the application of the next of kin, although the application was opposed by the Queen's Proctor.—*The Queen's Proctor v. Williams*, 221.

**WILL.**

1. *Will.*—*Conditional or General.*—*Actual Military Service.*—11th Section of *Wills Act*.

The words "I request that in the event of my death while serving in this horrid climate, or any accident happening to me," held not to make a testamentary paper conditional on the event of death while in that climate. A mere averment that the deceased held such a rank in his regiment, was in such a place, and was in actual military service at the date of writing the paper in question, is not necessarily enough to entitle such paper to be treated as a soldier's testament; but the affidavit should contain a statement of the circumstances full enough to enable the Court to judge whether the case falls within the meaning attributed by previous cases to the 11th section of the *Wills Act*.—*In the goods of George Thorne* (deceased), 36.

2. *Will of Foreign Property.*—*Will of English Property.*—*Probate.*

A testator dying domiciled in England, having made two wills in England, one relating exclusively to property in Peru, and the other to property in England, and appointing executors of both wills: Held, that the executor of the English will, who was also one of the executors of the Peru will, was entitled to probate of both instruments in this Court.—*In the goods of Michael Winter* (deceased), 204.

3. *Two Wills of the same Date.*—*Parol Evidence of Intention.*—*Probate of both Wills.*

Three duly-executed testamentary papers bore the same date, two of which purported to dispose of the residue. It was proved by parol evidence that the first was intended to apply only to certain property in Canada, and that the two last were intended to apply only to certain property in England. The three papers were admitted to probate as together containing the testator's last will and testament.—*In the goods of Nickalls* (deceased), 40.

## INDEX TO DIVORCE CASES.

### ADJOURNMENT.

*Adjournment.—Co-respondent.—Terms as to Costs.*

Where an adjournment was granted on the ground of surprise, at the instance of the respondent, in respect of a charge of adultery with a person other than the co-respondent, it was granted on the understanding that the co-respondent should not be prejudiced as to costs by such adjournment.—*Codrington v. Codrington and Anderson*, 63.

### ALIMONY PENDENTE LITE.

1. *Alimony pendente Lite.—Dissolution of Marriage.—Practice.*

*Alimony pendente lite* was allotted after there had been a verdict of adultery against the wife, but before the case came on for a final decree before the full Court.—*D'Oyley v. D'Oyley and Baldie*, 226.

2. *Alimony pendente Lite.—No Answer filed by Wife.*

Where a wife, who is charged in her husband's petition with adultery, has filed no answer to it, she is still entitled to have *alimony pendente lite* allotted to her.—*Smith v. Smith and Tremsaux*, 228.

3. *Alimony.—Order for Payment to Wife or her Solicitor.—Practice.*

An order for the payment of alimony to wife's solicitor will not be made without a written authority from her.—*Brown v. Brown*, 144.

4. *Alimony pendente Lite.—Wife a convicted Felon.*

*Alimony pendente lite* was allotted to a wife, even though at the time of the allotment she was in gaol undergoing a sentence for felony.—*Kelly v. Kelly*, 227.

### ALIMONY, PERMANENT.

1. *Permanent Alimony.—Diminution of Husband's Income.—Affidavits.*

Where a husband's income has diminished since the allotment of *alimony pendente lite*, he may, on a motion for permanent alimony, prove such diminution by affidavit.—*Davis v. Davis*, 228.

2. *Permanent Alimony.—Judicial Separation.—Order to secure by Deed rejected.*

The order of the Ecclesiastical Court for permanent alimony was an order for payment of a certain part of the husband's actual income, the amount of which might be varied according to his change of means, and the nature of this order is not altered, as regards alimony on judicial separa-



**ALIMONY, PERMANENT—continued.**

tion, by the Divorce Act. The Court refused to make an order on the husband to execute a deed charging stock with a yearly sum equal to the amount of permanent alimony allotted. The Court has more extensive powers of enforcing its decrees than the Ecclesiastical Court had.—*Hyde v. Hyde*, 80.

**APPEAL.**

*Form of Decision of Judge Ordinary.—Appeal to the House of Lords.* By 20 & 21 Vict. c. 85, s. 56, and 23 & 24 Vict. c. 144, s. 3, an appeal lies from the Judge Ordinary, discharging the functions of the full Court, by deciding on any petition for dissolution to the House of Lords. And where the Judge Ordinary had, in substance, disposed of an important question in a suit for dissolution, by refusing to give directions for the mode of trial of certain issues, from which refusal no appeal would be to the House of Lords, the full Court on appeal varied the order so as to enable the party aggrieved to appeal to the House of Lords.—*Rowley v. Rowley*, 137.

**APPEARANCE.**

*Absolute Appearance.—Plea to the Jurisdiction.—Party in Contempt.—Practice.*

A respondent who appears absolutely thereby admits the jurisdiction of the Court, and cannot afterwards amend his appearance in order to plead to the jurisdiction. The Court will not hear a party who is in contempt for any purpose except that of purging his contempt.—*Garstin v. Garstin*, 73.

**ATTACHMENT.**

1. *Non-compliance with Order for Payment of Costs.—Inability of Husband to Pay.—Attachment refused.*

The Court refused to grant an attachment against a husband for non-payment of certain costs incurred on behalf of the wife in a suit instituted by her for judicial separation on the ground of his alleged cruelty, where, on his uncontradicted answer, it appeared that the husband had been compelled to separate from her several months before the institution of the suit in consequence of her drunkenness and violence, and had not the present means of complying with the order for payment.—*Holland v. Holland*, 78.

2. *Attachment.—Non-payment of Alimony.—Office Copy of an Order for Alimony.—Attachment.—Right to Object.*

It is competent to a party to object, on a motion for attachment for non-compliance with an Order of the Court, on the ground of the insufficiency of the service of the Order on him. Service of an Order for the payment of Alimony is effected by showing to the party to be served an office copy of the Order, and by leaving with him a copy of it.—*Parr v. Parr and White*, 229.

## CITATION.

*Citation.—Personal Service.—Practice.*

The 42nd section of the Divorce Act and the Rules founded thereon require personal service of the citation and copy of the petition, unless the Court authorises a substituted service, or gives the petitioner leave to proceed without service. Acceptance of service by an attorney on behalf of the respondent is not sufficient.—*Milne v. Milne*, 183.

## COLLUSION.

*Collusion.—Dissolution of Marriage.—Respondent assisting in Identification.*

Where the respondent, who did not appear, and gave the petitioner's solicitor a photograph to aid in her identification, and attended in Court for the same purpose, for which attendance she received from the petitioner's solicitor £1, the Court having reason to believe that the parties were not acting in collusion, pronounced the decree.—*Harris v. Harris and Lambert*, 232.

## CONDONATION.

*1. Adultery of Wife.—Condonation.*

Before the Court can come to the conclusion of condonation by the husband, it must be satisfied that the husband continued to live with his wife with full knowledge of the acts of adultery alleged to be condoned. Where, to an action for maintenance, the husband had alleged the wife's adultery but failed to prove it, and afterwards lived with her, the Court refused to come to the conclusion of condonation.—*Ellis v. Ellis and Smith*, 154.

*2. Condonation not Pleaded.—Cruelty.*

Condonation proved at the hearing will be noticed by the Court, although it has not been pleaded.—*Curtis v. Curtis*, 234.

## CONFRONTATION.

*1. Confrontation.—Dissolution of Marriage.—Practice.*

The Court has no power to decree confrontation in a suit for dissolution of marriage for the purpose of identification.—*Hooke v. Hooke*, 236.

*2. Suit for Nullity by reason of previous Marriage.—Decree for Confrontation.*

The Court will follow the practice of the Ecclesiastical Court in making a decree of confrontation in fit cases.—*Enticknap v. Rice*, 136.

## CO-RESPONDENT.

*Co-respondent.—20 & 21 Vict. c. 85, s. 28.*

The petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-respondent, unless he is excused from so doing by the Court on special grounds.—Query, whether the fact that the petitioner can only obtain evidence admissible against the respondent, but inadmissible against the alleged adulterer, would be such special ground?—*Carryer v. Carryer and Watson*, 94.

**COSTS.**

1. *Costs.—Condonation.—Co-respondent.*

Where a husband has condoned adultery committed with a co-respondent, which has been revived by adultery committed by another person, costs will not be given against the co-respondent whose adultery was condoned.—*Norris v. Norris, Lawson, and Mason*, 237.

2. *Costs.—Co-respondent.*

Where there was no evidence to show that the co-respondent when he first formed the connection with the respondent, knew that she was a married woman, the Court refused to condemn him in costs.—*Priske v. Priske and Goldby*, 238.

3. *Costs.—Discretion of Court.*

The question of costs is in the discretion of the Court, in the circumstances of each case, and where the petitioner obtained a verdict establishing—1st, the adultery of the respondent and co-respondent; 2nd, the adultery of the respondent with a person other than the co-respondent; and 3rd, the petitioner's innocence of charges brought against him by the respondent, the Judge Ordinary, in the circumstances of the case, refused to condemn the co-respondent in costs other than those occasioned by the issue of adultery raised by his answer, and found against him.—*Codrington v. Codrington and Anderson*, 63.

4. *Costs.—Practice.—Dissolution Decreed in favour of Wife.*

A wife in whose favour a decree for a dissolution of marriage is made, is entitled to costs against her husband where no order has been made.—*Kaye v. Kaye*, 239.

5. *Costs.—Wife's Costs.—Unfounded Suit.—Deposit of Money in Registry.*

In a suit by the wife for judicial separation, an application was made in chambers for the usual order for the payment by the respondent of the petitioner's taxed costs, incurred previous to the hearing, to her attorney. Affidavits were filed showing that the petitioner had been living in open adultery for several years before the petition was filed, and up to the date of the petition. The Court, having reason to believe that the suit was not instituted *bonâ fide*, but for the purpose of obtaining costs from the husband, refused to make the usual order for the payment of costs to the petitioner's attorney, but directed that they should be paid into the Registry to abide the event of the hearing.—*Rogers v. Rogers*, 82.

6. *Costs.—Dissolution of Marriage.—Unfounded Claim for Damages.*

Where damages were claimed from a co-respondent, and it appeared that the respondent was leading an abandoned life when the co-respondent made her acquaintance, and there was evidence raising a strong suspicion that the petitioner must have been aware of that fact: Held that the co-respondent ought not to be condemned in costs, on the ground that

COSTS—*continued.*

the claim for damages was, under the circumstances, improper.—*Manton v. Manton and Stevens*, 159.

7. *Costs.*—*Order for Payment of Wife's Costs of Hearing.*—*Bill of Exceptions pending.*

After a wife has obtained a verdict and a decree *nisi* has been pronounced, an order was made for the payment by the husband of her surplus costs of the hearing beyond the sum deposited in the Registry, although a motion for a new trial and a bill of exceptions were pending.—*Chetwynd v. Chetwynd*, 108.

8. *Costs.*—*Husband's Petition.*—*Wife's Answer.*—*Unfounded Charge.*—*Costs.*

Where the wife's answer contains charges against the husband which at the trial appeared to have been made without any foundation, the whole of her costs will not be allowed to be taxed as against her husband.—*Clark v. Clark, Perrin, and Cumins*, 111.

## CRUELTY.

1. *Cruelty.*—*Quarrels.*—*Slight Acts of Violence.*—*Bodily and Mental Suffering.*

Cruelty established by proof of habitually insulting conduct and violent temper, connected with an adulterous intercourse carried on by the husband and leading to frequent quarrels, and occasionally to slight acts of violence, and causing mental and bodily suffering.—*Knight v. Knight*, 103.

2. *Cruelty.*—*Treating a Wife as a Prostitute in the Street.*

Where a husband assaulted his wife in the street in such a manner as to induce a passer-by to believe her to be and to treat her as a prostitute: Held, that although the respondent had inflicted no personal injury upon her, yet that he was guilty of cruelty.—*Milner v. Milner*, 240.

3. *Cruelty.*—*Wife's Petition for Dissolution.*—*Habits of Intoxication in connection with Cruelty.*

On the question of cruelty, the Court will consider the liability of danger which the wife would incur by returning to cohabitation with a husband subject to uncontrollable fits of drunkenness, such husband having used a certain amount of violence to the wife while under the influence of drink; and particular acts of violence will be viewed in connection with the cumulative misconduct of the married life.—*Power v. Power*, 173.

4. *Cruelty.*—*Wife's Petition.*

Where the evidence of actual violence used by the husband towards the wife is not sufficient of itself to warrant a decree on the ground of cruelty, the Court will take into consideration his general conduct towards her, and, if this is of a character tending to degrade the wife and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to pronounce the cruelty proved.—*Swatman v. Swatman*, 135.

CRUELTY—*continued.*

5. *Legal Cruelty.—Wife's Petition.*

Indifference, neglect, aversion to the wife's society, cessation of matrimonial intercourse, without personal violence or words of menace, do not amount to legal cruelty, though the husband is carrying on an adulterous intercourse with a servant under the same roof where he is residing with his wife.—*Cousen v. Cousen*, 164.

CUSTODY OF CHILDREN.

*Petition for Custody of Children.*—22 & 23 Vict. c. 61, s. 4.—*Intervention.*

When a petition for the custody of children after a final decree of dissolution is before the Court, persons, other than the parents, may intervene and bring before the Court such facts as in their opinion the interests of the children may require. The form of such intervention will be by petition, and the interveners act at their own risk as to costs.—*Chetwynd v. Chetwynd*, 151.

DAMAGES.

*Application of Damages.—Agreement between Petitioner and Co-respondent.*

After an order made for application of damages, the Court will not sanction any agreement between the petitioner and co-respondent, whereby the latter would be relieved from any part of what was due from him; but where after such an order, the petitioner was put to further expense of appeals and other litigation, the Court varied the original order so as to allow the petitioner to take a larger share of the damages, on the ground that the main intent of the original order had been to reimburse the petitioner the whole expense to which he had been put.—*Forster v. Forster and Berridge*, 131.

DECREE NISI.

3. *Queen's Proctor's Intervention.—Decree Nisi.—Motion to make Absolute.*

The Court will defer making a decree *nisi* absolute, after the expiration of three months from the time when it was pronounced, in order to enable the Queen's Proctor to make inquiries, and to lay a case before the Attorney-General for his directions, upon an affidavit being filed by the Queen's Proctor to the effect that he has received information of material facts, and that he intends to take the directions of the Attorney-General.—*Palmer v. Palmer*, 143.

DESERTION.

*Desertion.—Effect of an Allowance to Wife by Husband.*

A wife is entitled to the society and protection of her husband, and if, after refusing to live with her, he gives her an allowance, the payment of such allowance to her is no answer to the charge of wilful desertion.—*Macdonald v. Macdonald*, 242.

## DETECTIVES.

*Direct Evidence of Adultery.—Employment of Private Detectives.*

In support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband; but, in consequence of the improbability of that evidence, of the discrepancies in the statements of the witnesses, and of the improper manner in which it had been got up by the private detectives employed by the petitioner, the Court refused to act upon it, and dismissed the petition.—*Sopwith v. Sopwith*, 243.

## EVIDENCE.

1. *Evidence.—Marriage in a British Colony.*

Proof of the solemnization of a marriage in a British Colony by a clergyman of the Church of England, according to the rites of that Church, is sufficient evidence of a marriage for the purposes of a divorce.—*The Countess of Limerick v. the Earl of Limerick*, 252.

2. *Evidence.—Marriage in Chili.*

Proof of a marriage in Chili was established by the production of a certified extract of the entry of the marriage in the Marriage Register, proved to be kept in Chili, in compliance with the requirements of the laws of Chili, and to be admissible in evidence in Chili, upon the Court being satisfied of the identity of the parties named in the certificate, and of the curate rector who gave the certificate.—*Abbott v. Abbott and Godoy*, 254.

3. *Evidence de bene esse.—Examination of Petitioner's Witnesses de bene esse.—Alimony pendente Lite.*

On the last day of the sittings the Judge Ordinary allowed the petitioner's witnesses to be examined, though the case was not in the list for the day, on the understanding that, if the respondent and co-respondent intimated their intention to defend the suit, the case should be re-heard. The evidence proved adultery, but was not allowed to prejudice the wife's application for alimony *pendente lite*.—*Phillips v. Phillips and Medlyn*, 129.

## INTERVENTION.

1. *Dissolution of Marriage.—Decree Nisi.—Intervention.—Charge of Collusion.—Admissibility of Petitioner's Evidence.*

H. petitioned for dissolution of marriage; the respondent answered, and made counter-charges; some evidence in support of those charges was offered at the trial, but a verdict was found for the petitioner on all issues, and a decree *nisi* made. The Queen's Proctor intervened, and alleged the same charges of adultery as had been in issue on the respondent's answer, and collusion: The Court held that the intervener was not bound to prove the collusion before he went into the question of the

INTERVENTION—*continued*.

adultery ; also that the petitioner not a competent witness in a proceeding by an intervener showing cause against a decree *nisi*, and that the Court would not examine him under the 43rd section of the 20 & 21 Vict. c. 85, in support of his own petition.—*Harding v. Harding and Lance*, 145.

2. *Queen's Proctor*.—*Intervention after Decree Nisi*.

Where the Queen's Proctor has intervened after the decree *nisi*, and the attendance of the petitioner at the hearing is necessary for the purpose of proving his identity, the Court will order the proceedings to be stayed until his appearance.—Query, whether the Court has power to order the petitioner to attend under section 43 of the Divorce Act, when the Queen's Proctor has intervened after the decree *nisi*?—*Pollock v. Pollock, Dean, and Macnamara*, 266.

JUDICIAL SEPARATION.

1. *Judicial Separation*.—*Cross-Suit for Dissolution*.—*Decree*.

A judicial separation was decreed on a verdict establishing the husband's cruelty, though an issue in a cross-suit as to the wife's adultery was still pending.—*Bancroft v. Bancroft*, 84.

2. *Divorce à Mensâ et Thoro*.—*Judicial Separation*.—*Adultery*.—*Petition by a Wife divorced à Mensâ et Thoro by an Ecclesiastical Court*.

A wife who had obtained a decree from the Consistory Court of London for a divorce *à mensâ et thoro*, on the ground of adultery, filed a petition for a judicial separation, containing the same allegations as those on which the former decree was founded. The Judge Ordinary did not decline to receive the petition, but intimated a doubt whether he had jurisdiction to re-hear the case.—*Ciocci v. Ciocci*, 250.

MAINTENANCE.

1. *Maintenance of Children*.—*Order for Settlement of Wife's Property*.—*Power of Appointment*.

The Court made an order for the trustees of a wife's settled property, against whom a decree of judicial separation had been pronounced, on the ground of her adultery, to pay a moiety of the income of such property for the maintenance and education of the children. The Court cannot vary a power of appointment vested in a guilty wife.—*Seatel v. Seatel*, 230.

2. *Wife's Petition*.—*Dissolution of Marriage*.—*Permanent Maintenance*.

Where the wife obtains a decree of dissolution of marriage, the Court is inclined, so far as the circumstances of the case admit, to order the husband to secure her a permanent maintenance, on the principle, as to amount, of permanent alimony on a decree of judicial separation.—*Sidney v. Sidney*, 178.

## NEW TRIAL.

1. *New Trial.—Affidavit.*

On a motion for new trial it was urged that the jury had been unfairly affected, as against the co-respondent, by the production of a draft or duplicate of a letter in the handwriting of the respondent, and found in her custody, there being no proof that the original or duplicate had been sent to, or reached, the co-respondent. The Judge Ordinary held that this ground for a new trial should have been founded on an affidavit from the co-respondent that he had not in fact received such original or duplicate.—*Codrington v. Codrington and Anderson*, 63.

2. *New Trial.—New Suit.—Dissolution of Marriage.—Second Petition.—22 & 23 Vict. c. 61, s. 6.*

A wife had filed a petition for a dissolution of marriage, on the ground of adultery, coupled with desertion and cruelty. The case was tried before the passing of the 22 & 23 Vict. c. 61, which renders the wife competent to give evidence of desertion and cruelty. The full Court refused to dissolve the marriage, on the ground that there was not sufficient evidence of desertion and cruelty, but pronounced a decree of judicial separation, on the ground of adultery. After the passing of the 22 & 23 Vict. c. 61, she applied for leave to file a second petition for a dissolution of marriage, containing the allegations that she had before failed to establish. The Judge Ordinary granted leave, but expressed a strong opinion that the full Court would refuse to re-hear the case.—*Bevan v. Bevan*, 265.

3. *New Trial.—Verdict against two Co-respondents.*

Where there is a verdict against two co-respondents, and the Court is dissatisfied with the verdict against one only of the two co-respondents, it will grant a new trial as to both. *Semble*, if the petitioner will allow a verdict to be entered for the co-respondent applying for a new trial, the Court may grant the decree.—*Walker v. Walker, Nicol, and Craig*, 264.

## NULLITY OF MARRIAGE.

1. *Woman's Suit for Nullity.—Impotence.—Triennial Cohabitation.—Evidence.*

When the Court is satisfied by other evidence, *e.g.*, that of the petitioner herself, of the man's impotence, the rule of apparent virginity after cohabitation of three years does not apply. In the present case the man did not appear, and did not submit to the order for inspection; the medical evidence was not conclusive as to the woman's virginity, but the Court, on her evidence on affidavit, took it to be proved, first, that the marriage was never consummated; secondly, that this was owing to the impotence of the man; thirdly, that the physical appearance of the woman was to be accounted for otherwise than by consummation; and pronounced a decree of nullity of marriage.—*F. (falsely called D.) v. D*, 86.



**NULLITY OF MARRIAGE—continued.**

**2. Woman's Petition for Nullity.—Inspectors' Report.—Conflicting Evidence.**

The woman cohabited with her husband from their marriage, in November, 1848, till July, 1862; she then occupied a separate bed for two or three weeks, and left his house in August, 1862, after disputes about other matters, and did not return to it. In May, 1864, she filed her petition for nullity by reason of his impotence; he traversed this, and alleged consummation. The report of the inspectors pronounced her to be a virgin and apt, and stated that the man had no apparent imperfection. At the hearing the petitioner and respondent both gave evidence, and medical men, besides the inspectors, gave evidence on both sides. In the result the Court held, that the petitioner had failed to prove that the marriage had remained unconsummated by reason of the impotence of the man, and dismissed him from the suit.—*L. (falsely called H.) v. H.*, 115.

**3. Nullity.—Undue Publication of Banns.—4 Geo. IV. c. 76, ss. 7 and 22.—Costs.**

A marriage by banns, where by the consent of both parties the name of the man was falsely stated to be "John," his baptismal name being "Bower" only, was declared null and void. The man was condemned in costs because he induced the woman to consent to the undue publication by telling her that it would not render the marriage invalid. —Query, whether a respondent in a suit of nullity by reason of undue publication of banns, who pleaded in confirmation of the petition, would be precluded by the dismissal of that petition from presenting another founded upon the same allegations?—*Midgeley v. Wood*, 267.

**PARTICULARS.**

**Order for Particulars.—Sufficiency.—Adjournment by Reason of Surprise.—Charges by Respondent against Petitioner not established.—Costs against Co-respondent.—New Trial.**

On summons for particulars of a charge of adultery, an order was made to give, at least ten days before the trial, particulars specifying dates and occasions, or the petitioner to be precluded from giving other than documentary evidence in support of certain charges of adultery. A statement, purporting to be particulars, was given, but with scarcely any specification of dates and occasions. At the trial evidence other than documentary was objected to, on the ground that the order for particulars had in substance not been complied with; but the Judge Ordinary held that the evidence was admissible, and that if the particulars were not sufficient, the proper course would have been to apply for further and better particulars.—*Codrington v. Codrington and Anderson*, 63.

## PLEADING—AMENDMENT OF ANSWER.

*Evidence of Recriminatory Charges not Plead.*—*Amendment of Answer.*—*Costs.*

A co-respondent whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the Court to exercise its discretion by withholding a decree; but upon a statement being made that the co-respondent would probably be able to establish a case of such misconduct on the part of the petitioner if he had the opportunity, the Court allowed him to amend his answer by the insertion of various counter-charges against the petitioner, and reserved the question of the costs of the day until the merits of the case had been ascertained.

—*Plumer v. Plumer and Bygrave*, 257.

## PLEADING—RECRIMINATION.

*Judicial Separation.*—*Withdrawal of Wife from Bed.*

To the wife's petition for judicial separation, on the ground of the husband's cruelty and adultery, an allegation on his part that the wife had wilfully withdrawn herself from his bed, and refused him conjugal rights, is no answer.—*Rowe v. Rowe*, 162.

## PRACTICE.

1. *Practice.*—*Dismissal of Petition.*—*No Evidence produced.*

The Queen's Proctor intervened in a suit for dissolution in which the respondent did not appear, and alleged collusion and the petitioner's adultery. No evidence being tendered in support of the petition, when the case came on for hearing the Court dismissed the petition, without requiring evidence to be produced in support of the Queen's Proctor's plea.—*Sheldon v. Sheldon*, 75.

2. *Practice.*—*Heading of Affidavit verifying Petition.*

The affidavit verifying the petition should be headed "In the matter of the Petition of A. B."—*Gapp v. Gapp and Leveson*, 273.

3. *Practice.*—*Name of Co-respondent mis-spelt in Citation.*—*Fresh Citation.*

Where co-respondent's name had been mis-spelt in the citation served, the Court made an order for a fresh citation to issue.—*Cotton v. Cotton and Kinnis*, 275.

4. *Practice.*—*Two Motions for Attachment for Non-payment of Money.*—*Costs for one only allowed.*

An application for an attachment against a husband for non-payment of alimony and costs should be made in one motion. The costs for two motions will not be allowed against the husband.—*Watts v. Watts*, 274.

5. *A Wife's Suit for Judicial Separation turned into a Suit for Dissolution of Marriage.*—*Re-service of Petition.*

Where both parties are before the Court, a wife's suit for judicial separa-

**PRACTICE**—*continued*.

tion may be turned into one for a dissolution of marriage without issuing a fresh citation, but there must be a re-service of the petition on the respondent.—*Cartledge v. Cartledge*, 249.

6. *Wife's Prayer for Dissolution.—Refusal of a Judicial Separation.*

Where, on a petition for dissolution of marriage by a wife, the only facts which in the opinion of the Court the petitioner is at liberty to prove would be ground for a decree of judicial separation only, and the petitioner refuses to amend the petition by praying for judicial separation, the petition must be dismissed.—*Rowley v. Rowley*, 137.

**RESTITUTION.**

*Restitution of Conjugal Rights.—Nature of Defence.*

Unless the respondent to a petition for restitution of conjugal rights can establish a legal defence to the petition, the petitioner will be entitled to a decree, and the Court has no discretion to inquire into the sincerity of the petitioner in bringing the suit.—*Scott v. Scott*, 113.

**REVIVAL.**

*Revival of Condoned Adultery by subsequent Cruelty.—Dissolution of Marriage.*

The word "condonation" has the same meaning in the Divorce Acts that it had in the Ecclesiastical Courts. Condoned adultery, therefore, may be so revived by subsequent cruelty as to found a sentence of dissolution. The Court will, at the prayer of the petitioner, at the hearing make a decree of judicial separation instead of a decree *nisi* for dissolution, although the petition prays for dissolution, and the facts are proved on which the dissolution might have been granted.—*Dent v. Dent*, 105.

**SEPARATION.**

*Petition for Dissolution.—Wilful Separation.—Discretion of Court.*

The petitioner, son of a clergyman, and having taken his degree at Cambridge, married a woman who had been living as a prostitute in Cambridge, on the 13th of June, 1863. Nothing in the nature of continuous cohabitation took place. In October, 1863, the petitioner's father became aware of the fact, and in December, 1861, a deed of separation, under which the respondent was to receive £1 a week, was executed. The adultery proved took place in the early part of 1864. The petitioner was dependent on his father. The Court held that the separation, if wilful, was not without reasonable excuse, and made a decree, *nisi*.—*Proctor v. Proctor, Smith, and Pitman*, 140.

**SEQUESTRATION.**

*Sequestration Attachment.—Writ of Assistance.—Practice.*

A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property

SEQUESTRATION—*continued.*

which was in the hands of parties holding under the person whose estate had been sequestered, and was refused. The Court declined to enforce the sequestration by an attachment against those parties, but granted a writ of assistance to the sheriff for that purpose.—*Bayley v. Bayley*, 222.

## SETTLEMENTS.

1. *Dissolution of Marriage.—Death of Petitioner.*—22 & 23 Vict. c. 61  
The Court will make an order varying the trusts of a marriage settlement, on the petition of the guardian of the children of the marriage after the death of the petitioner.—*Ling v. Ling and Croker*, 99.

2. *Dissolution of Marriage.—Annuity to Wife.*—20 & 21 Vict. c. 85, s. 32.

Under the above section, the Court can order an annuity to be secured to the wife only on making the decree; the order, therefore, would be permanent and incapable of being varied to meet the varying fortunes of the husband. Where the husband's income was professional, and the wife was entitled to a sum of money in reversion, which was imminent, the Court refused to make any order under the section. The Court ought also to consider the conduct of the parties.—*Rawlins v. Rawlins*, 158.

3. *Settlement of Damages.—Order.—Application for Amendment.*

Where the Court, on pronouncing the decree *nisi*, had directed the damages to be invested, and the annual income arising from them to be paid to the respondent "dum casta vixerit," and the decree has been made absolute: Held, that it was too late afterwards to apply to the Court to amend the order by inserting in it after the words "dum casta" the words "et sola."—*Narracott v. Narracott and Hesketh*, 76.













